UPC Spring 2020 Caselaw Update

John J. Nielsen

Assistant Solicitor General

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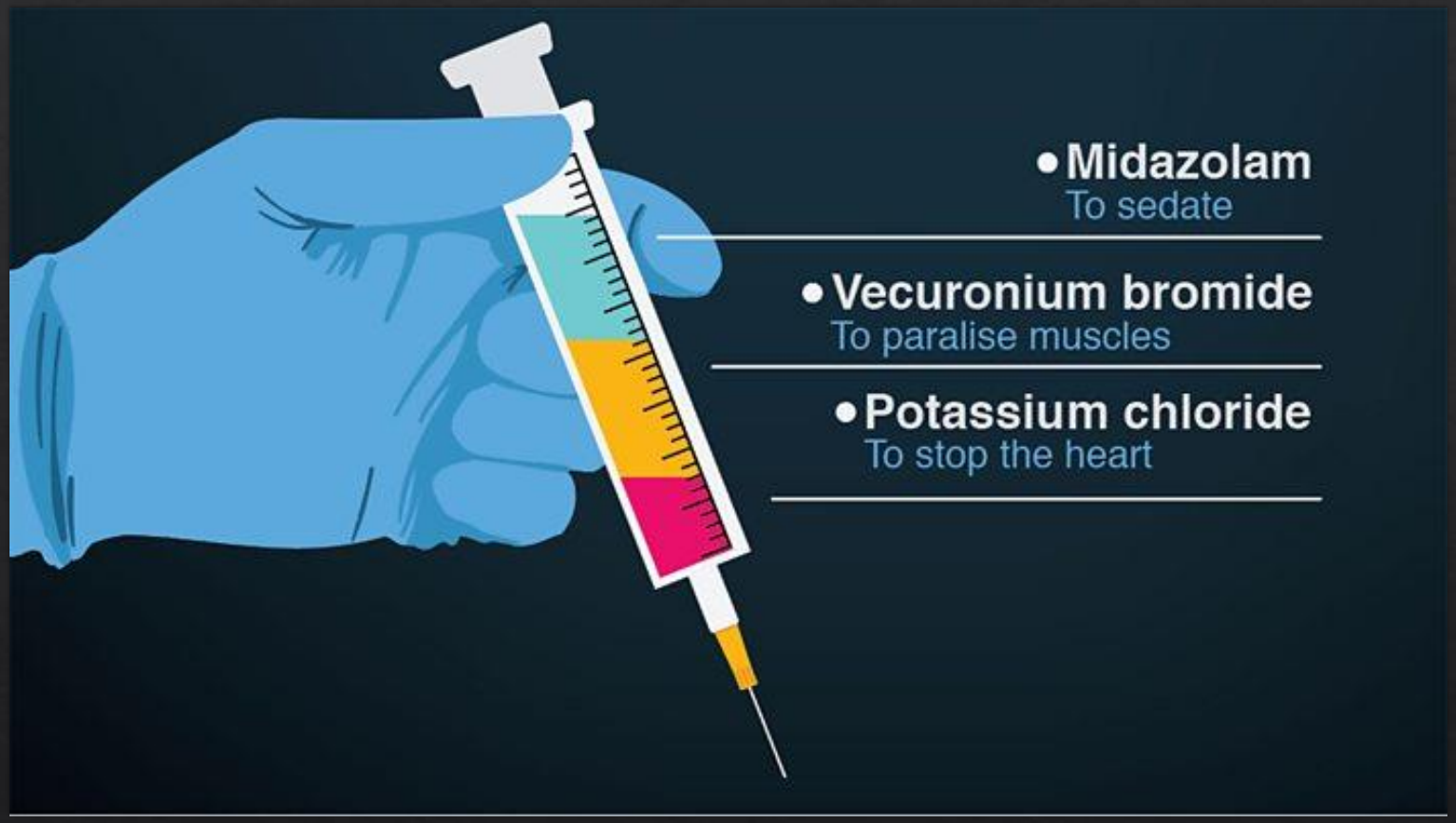
Bucklew v. Precythe



Bucklew v. Precythe

- Question: Does the Eighth Amendment guarantee painless execution?
- Answer: No.

Bucklew v. Precythe

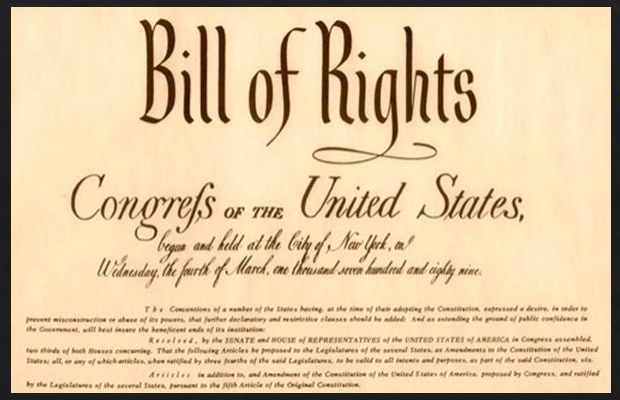
DENIED

Bucklew v. Precythe

Bucklew v. Precythe

Bucklew v. Precythe

- Eighth Amendment: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”


Bill of Rights

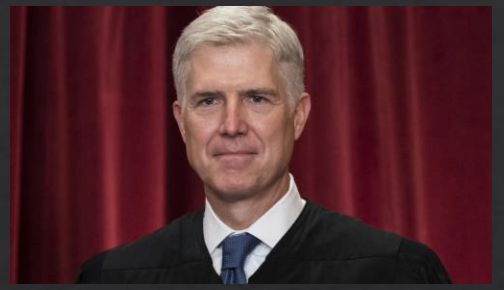
Congress of the United States,
begun and held at the City of New York, on
Wednesday, the fourth of March, one thousand seven hundred and eighty nine.

THE Conventions of a number of the States having, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution:

RESOLVED, by the SENATE and HOUSE of REPRESENTATIVES of the UNITED STATES of AMERICA in Congress assembled, two thirds of both Houses concurring, That the following Articles be proposed to the Legislatures of the several States, as Amendments to the Constitution of the United States; all, or any of which articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution, viz.

ARTICLES in addition to, and Amendment of the Constitution of the United States of America, proposed by Congress, and ratified by the Legislatures of the several States, pursuant to the fifth Article of the Original Constitution.

Bucklew v. Precythe



- The Constitution expressly permits the death penalty for treason, speaks of taking life after "due process."
- Death was the "standard penalty" for serious crimes at the time of the founding.
- Intentionally cruel—that is, torturous and disgraceful methods (drawing and quartering, disemboweling, burning alive, public dissection, etc.)—had fallen out of use, and so were "unusual."
- But other possibly, unintentionally cruel—that is, not meant to inflict pain, but not entirely painless—methods were not unusual, like hanging
- The Eighth Amendment as originally understood does not guarantee a painless death, merely one by outdated methods that were often meant to inflict pain.
  - States have striven to reduce pain in executions. If they went in the other direction, the petitioner would have to propose a less painful alternative that the State can readily implement.

Mitchell v. Wisconsin

Mitchell v. Wisconsin

- Question: When does the exigent circumstances exception justify warrantless blood draws?
- Answer: When the suspect's condition deprives police of a reasonable opportunity to get a breath test.

Mitchell v. Wisconsin

Mitchell v. Wisconsin

Mitchell v. Wisconsin

- Birchfield v. North Dakota (2016): search incident to arrest justifies alcohol breath tests without warrants on conscious people
- Schmerber v. California (1966): warrantless blood draw okay if there is an accident and no time to get a warrant
- South Dakota v. Neville (1983): prosecutors can argue consciousness of guilt from refusal to take BAC test
- Missouri v. McNeely (2013): the evanescence of BAC evidence alone is not enough to constitute an exigency

Drinks	Body Weight in Pounds								Influenced
	100	120	140	160	180	200	220	240	
1	.04	.03	.03	.02	.02	.02	.02	.02	Possibly
2	.06	.06	.05	.05	.04	.04	.03	.03	
3	.11	.09	.08	.07	.06	.06	.05	.05	Impaired
4	.15	.12	.11	.09	.08	.08	.07	.06	
5	.19	.16	.13	.12	.11	.09	.09	.08	Legally Intoxicated
6	.23	.19	.16	.14	.13	.11	.10	.09	
7	.26	.22	.19	.16	.15	.13	.12	.11	
8	.30	.25	.21	.19	.17	.15	.14	.13	
9	.34	.28	.24	.21	.19	.17	.15	.14	
10	.38	.31	.27	.23	.21	.19	.17	.16	

Mitchell v. Wisconsin

- Lower courts: Because Mitchell was unconscious, he could not revoke his implied consent under State law (which just about everyone, including Utah, has)
- Mitchell sought review on this question: “Does a statute authorizing a blood draw from an unconscious motorist provide an exception to the Fourth Amendment warrant requirement?”
  - So cert granted (everyone thought) to address validity of implied consent laws.

Mitchell v. Wisconsin

- Drunk driving is a huge problem that costs thousands of lives each year.
- If States are going to enforce DUI laws, they need to prove BAC. To know BAC, they need to test. If they can't breath test, they need to blood test.
- New test: exigency exists when (1) probable cause to believe intoxicated; (2) BAC is dissipating (isn't it always?); and (3) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application.
- This is more like *Schmerber*—when a suspect's unconsciousness prevents police from giving a breath test, they can do a warrantless blood draw.
- Bottom line, implied consent laws okay regarding unconscious drivers; though court leaves open possibility of "unusual" case in which unconsciousness would not be enough.

Gamble v. United States

Gamble v. United States

- Question: Is the dual sovereignty doctrine still a thing?
- Answer: Yep.

Gamble v. United States

Gamble v. United States

(a) No person who has been convicted in this state or elsewhere of committing or attempting to commit a crime of violence, misdemeanor offense of domestic violence, violent offense as listed in Section 12-25-32(15) , anyone who is subject to a valid protection order for domestic abuse, or anyone of unsound mind shall own a firearm or have one in his or her possession or under his or her control.

(b) No person who is a minor, except under the circumstances provided in this section, a drug addict, or an habitual drunkard shall own a pistol or have one in his or her possession or under his or her control.

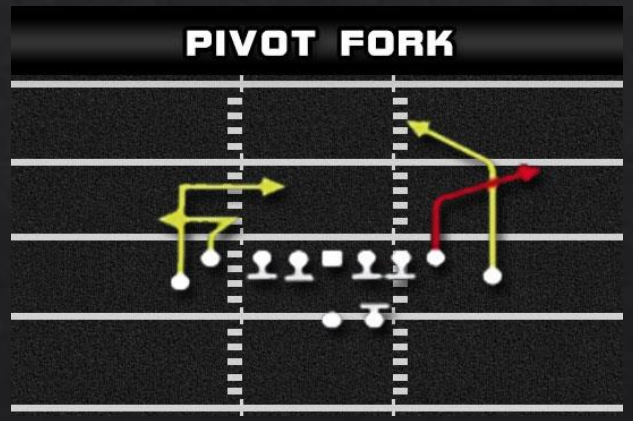
Gamble v. United States

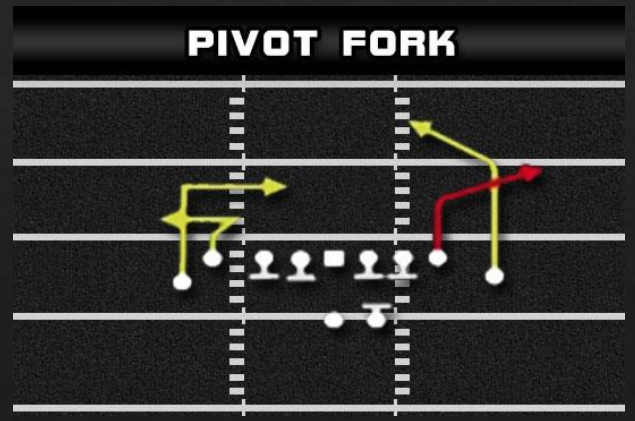
Gamble v. United States

(g) It shall be unlawful for any person—
(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; . . .
to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Gamble v. United States

- Fifth Amendment: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life of limb; . . . ."





Gamble v. United States

781 GALES & SEATON'S HISTORY 782

H. OF R.] *Amendments to the Constitution.* [AUGUST 17, 1789.

The question on Mr. BURKE's motion was put, and lost by a majority of thirteen.

The fourth clause of the fourth proposition was taken up as follows: "No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Mr. SCHTZE hoped soldiers would never be quartered on the inhabitants, either in time of peace or war, without the consent of the owner. It was a burthen, and very oppressive, even in

Mr. GERRY said either his amendment was essential, or the whole clause was unnecessary.

On putting the question, thirteen rose in favor of the motion, thirty-five against it; and then the clause was carried as reported.

The fifth clause of the fourth proposition was taken up, viz: "No person shall be subject, in case of impeachment, to more than one trial or one punishment for the same offence, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

Mr. BENSON thought the committee could not agree to the amendment in the manner it stood, because its meaning appeared rather doubtful. It says that no person shall be tried more than once for the same offence. This is contrary to the right heretofore established; he presumed it was intended to express what was secured by our former constitution, that no man's life should be more than once put in jeopardy for the same offence; yet it was well known, that they were entitled to more than one trial. The humane intention of the clause was to prevent more than one punishment; for which reason he would move to amend it by striking out the words "one trial or."

Mr. SHERMAN approved of the motion. He said, that as the clause now stood, a person found guilty could not arrest the judgment, and obtain a second trial in his own favor. He

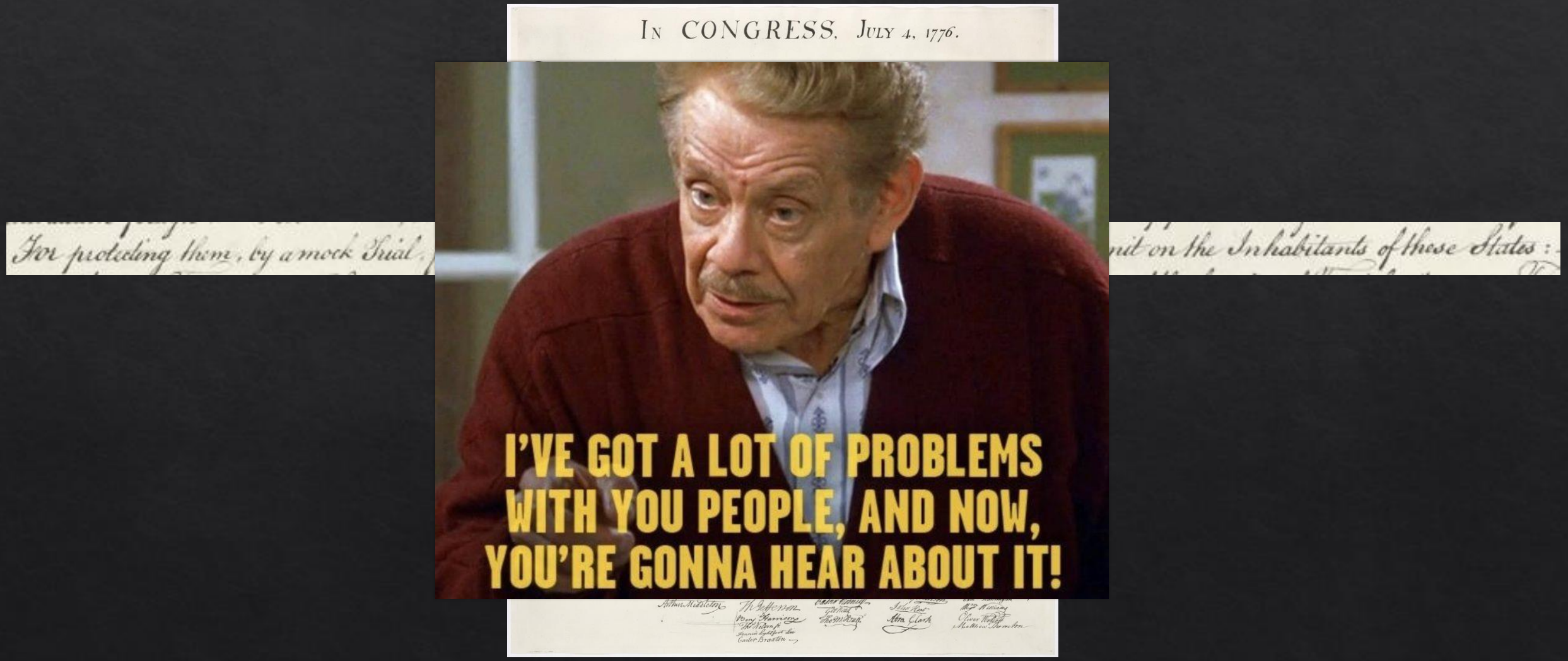
dence against himself. He thought it ought to be confined to criminal cases, and moved an amendment for that purpose; which amendment being adopted, the clause as amended was unanimously agreed to by the committee, who then proceeded to the sixth clause of the fourth proposition, in these words, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Mr. SMITH, of South Carolina, objected to the words "nor cruel and unusual punishments;" the import of them being too indefinite.

Mr. LIVERMORE.—The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often de-

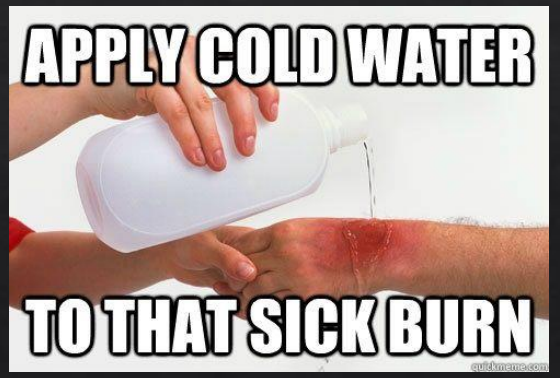
Mr. PARTRIDGE moved to insert after "same offence," the words "by any law of the United States." This amendment was lost also.

Gamble v. United States



Gamble v. United States

- “On Gamble’s reading, the same Founders who quite literally *revolted* against the use of acquittals abroad to bar criminal prosecutions here would soon give us an Amendment allowing foreign acquittals to spare domestic criminals. We doubt it.”



Gamble v. United States

- *Fox v. Ohio*, 5 How. 410 (1847)
- *U.S. v. Marigold*, 9 How. 560 (1850)
- *Moore v. Illinois*, 14 How. 13 (1852)

Gamble v. United States

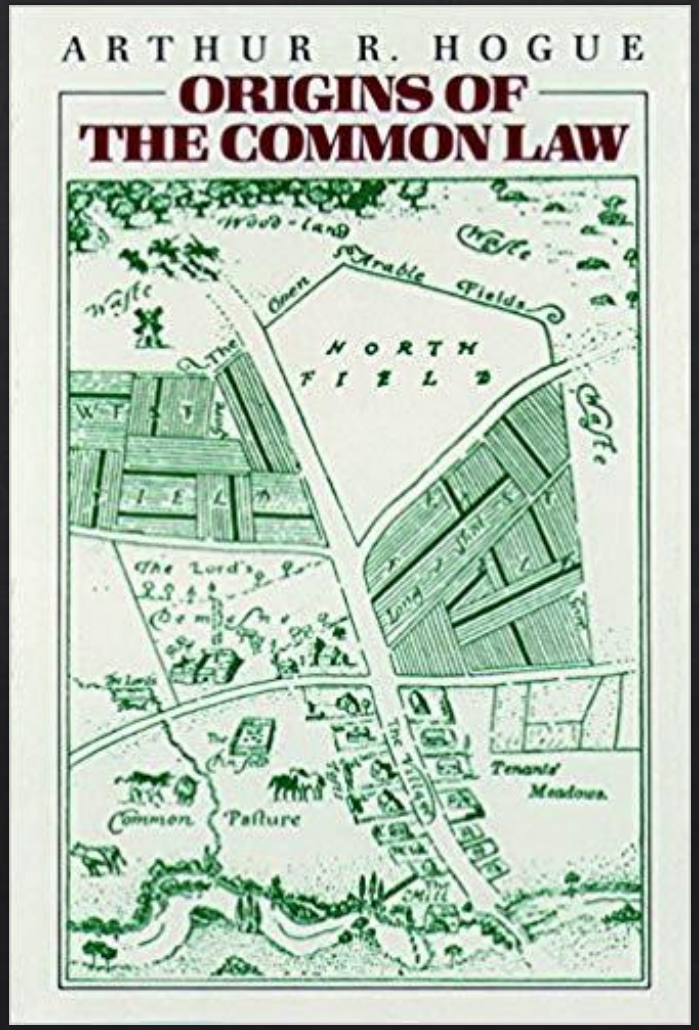
QUARTZ

REALITY CHECK

The risk of dying on vacation is actually really, really low

By Jay L. Zagorsky • June 12, 2019

Gamble v. United States

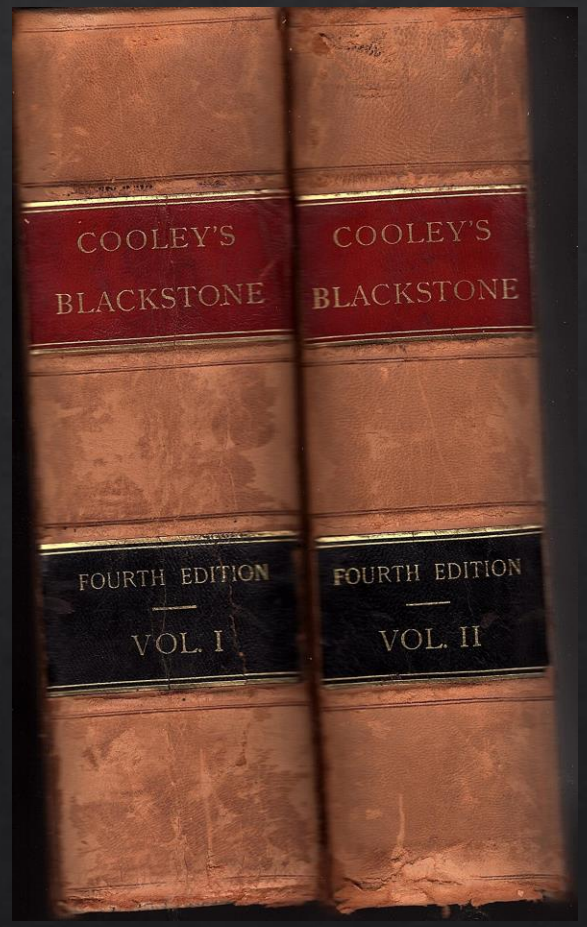


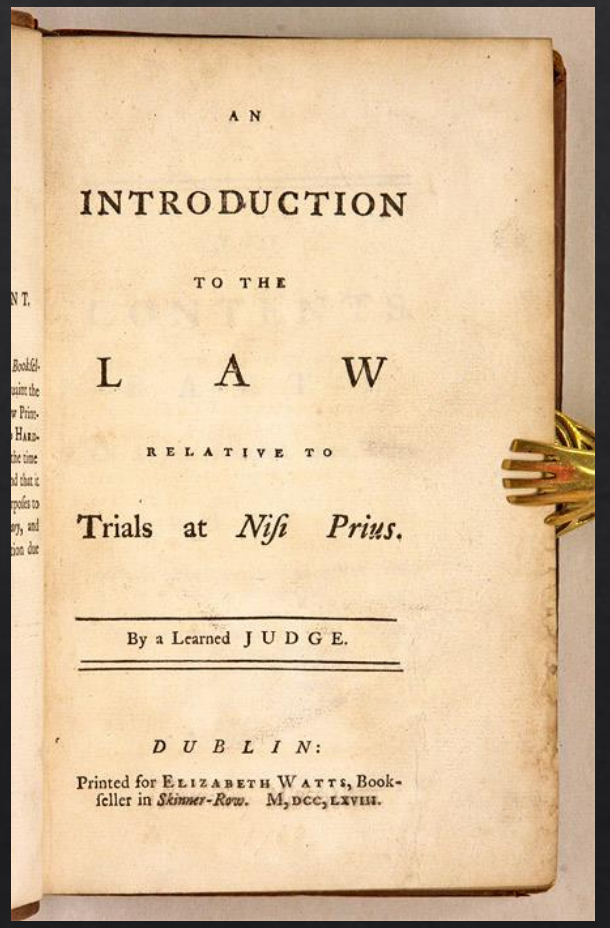
Gamble v. United States

The Hutchinson Cases:

- *Rex v. Hutchinson, 3 Keb. 785, 84 Eng. Rep. 1011 (1677)*
- *Gage v. Bulkeley, Ridg. T. H. 263, 27 Eng. Rep. 824 (Ch. 1744)*
- *Burrows v. Jemino, 2 Str. 733, 93 Eng. Rep. 815 (K. B. 1726)*
- *King v. Roche, 1 Leach 134*
- *Rex v. Thomas, 1 Lev 118, 83 Eng. Rep. 326 (K. B. 1664)*

Gamble v. United States




AN

INTRODUCTION

TO THE

L A W

RELATIVE TO

Trials at *Nisi Prius*.

By a Learned JUDGE.

DUBLIN:

Printed for ELIZABETH WATTS, Bookseller in *Skinner-Row*. M, DCC, LXVIII.

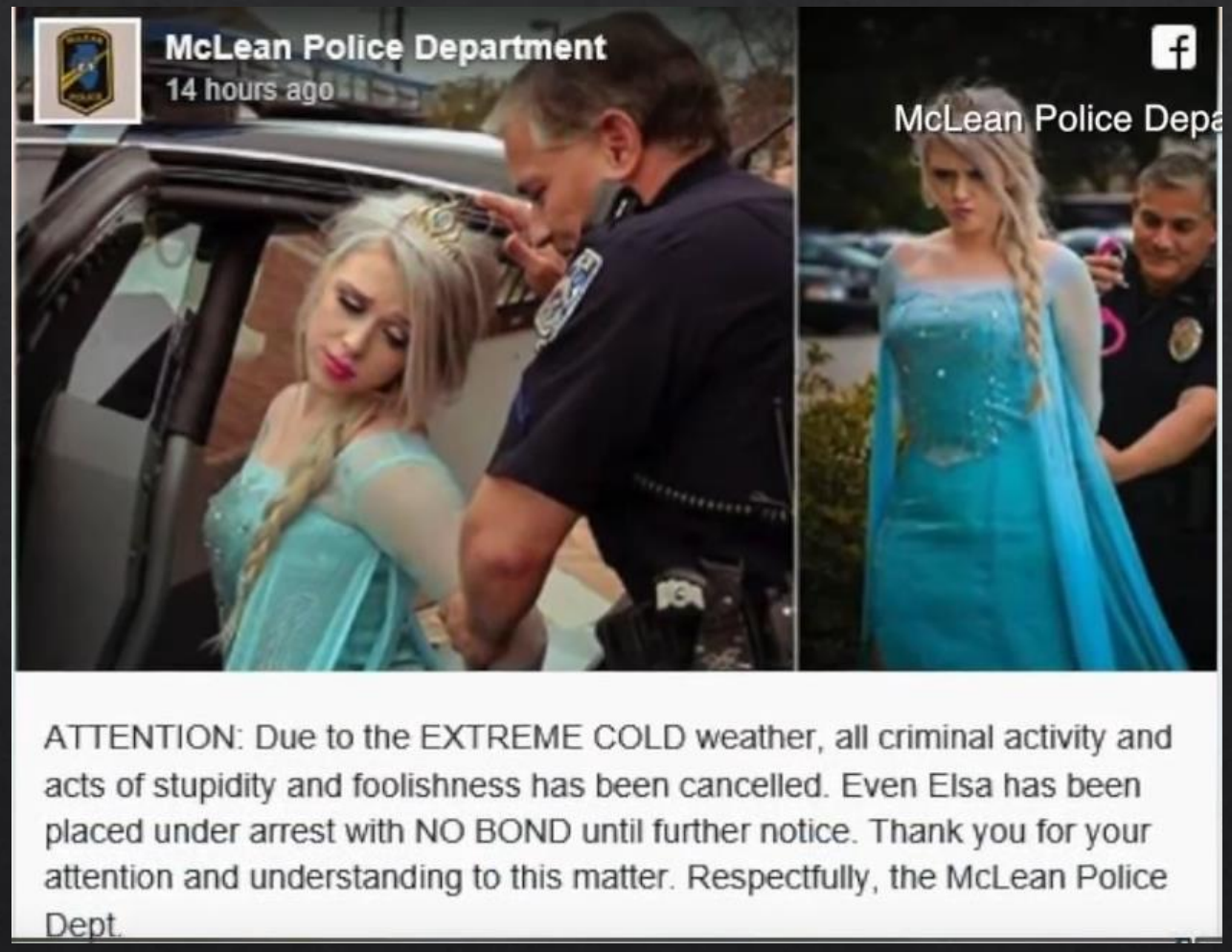
Gamble v. United States

"This is a curious argument indeed. It would have us hold that the Fifth Amendment codified a common-law right that existed in *legend*, not case law."

Gamble v. United States

- Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." Of course, it is also important to be right, especially on constitutional matters, where Congress cannot override our errors by ordinary legislation. But even in constitutional cases, a departure from precedent "demands special justification."
- "This means that something more than ambiguous historical evidence is required before we will flatly overrule a number of major decisions of this Court. And the strength of the case for adhering to such decisions grows in proportion to their antiquity."

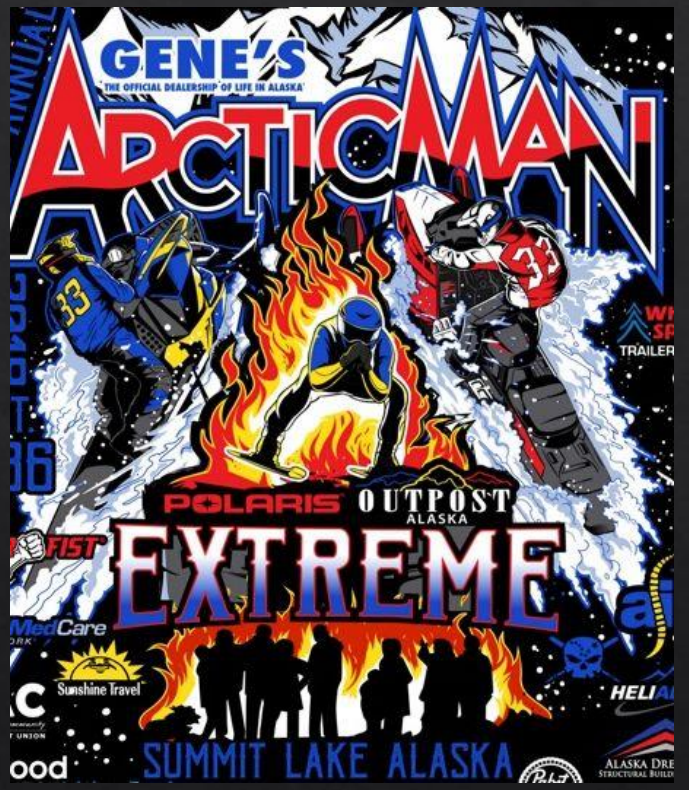
Nieves v. Bartlett



Nieves v. Bartlett

- Question: Does probable cause for arrest defeat a retaliatory arrest claim?
- Answer: Yes, usually. Okay, almost always.

Nieves v. Bartlett

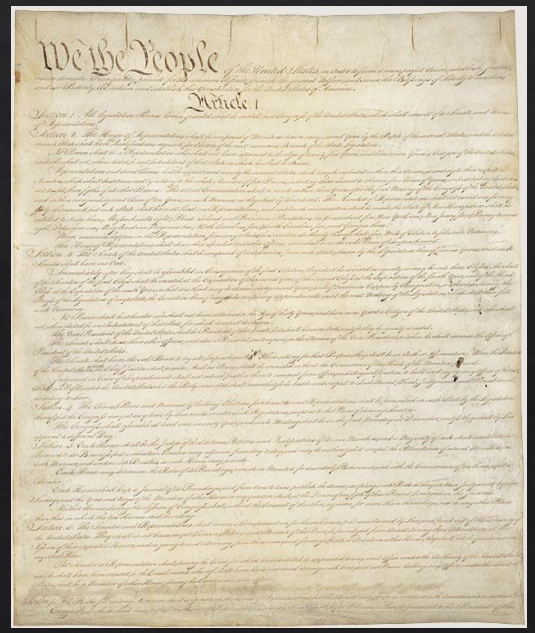


Nieves v. Bartlett

Nieves v. Bartlett

Nieves v. Bartlett

- 42 U.S.C. § 1983: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress,



Nieves v. Bartlett

- Retaliation—the Current Rules
  - *Lozman v. Riviera Beach (*2018)
  - *Mt. Healthy City Bd. Of Ed. v. Doyle* (1977)
  - *Hartman v. Moore* (2006)

Nieves v. Bartlett

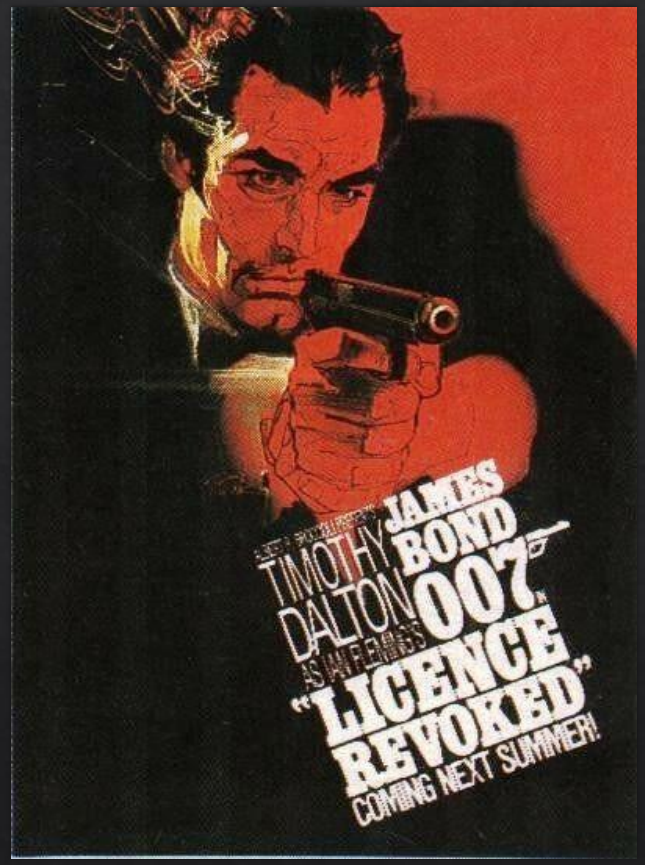
- Retaliatory arrest is like retaliatory prosecution:
  - Tenuous Causal Connection
  - Protected Speech is often legitimate reason to arrest
  - Split Second Decisions
  - Evidence of PC in virtually every case.

Nieves v. Bartlett

Nieves v. Bartlett

- "Although probable cause should generally defeat a retaliatory arrest claim, a narrow qualification is warranted for circumstances where officers have probable cause to make arrests, but typically exercise their discretion no to do so."
- This is based on history of section 1983. When 1983 was enacted, officers generally could only arrest for misdemeanors in limited circumstances. But now all 50 states allow arrests for most misdemeanors.
  - Example: the jaywalking protestor.
- We conclude that the no-probable-cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.

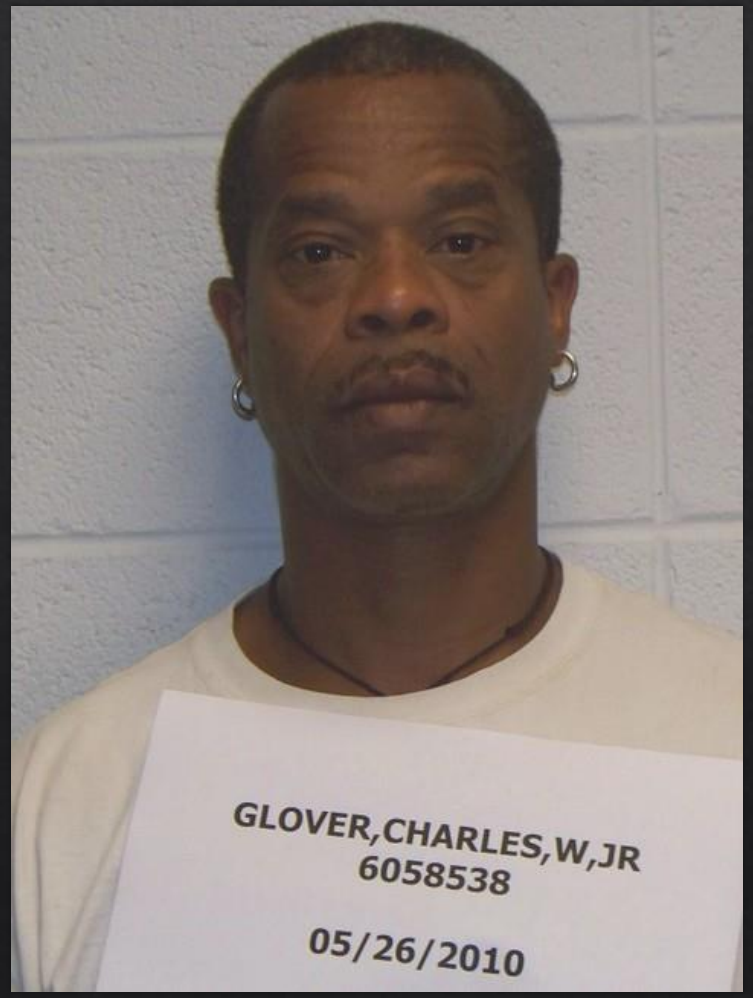
Kansas v. Glover



Kansas v. Glover

- **Question:** Absent obvious contrary information, do police have reasonable suspicion to pull over a car if the owner's license is revoked?
- **Answer:** Yes.

Kansas v. Glover



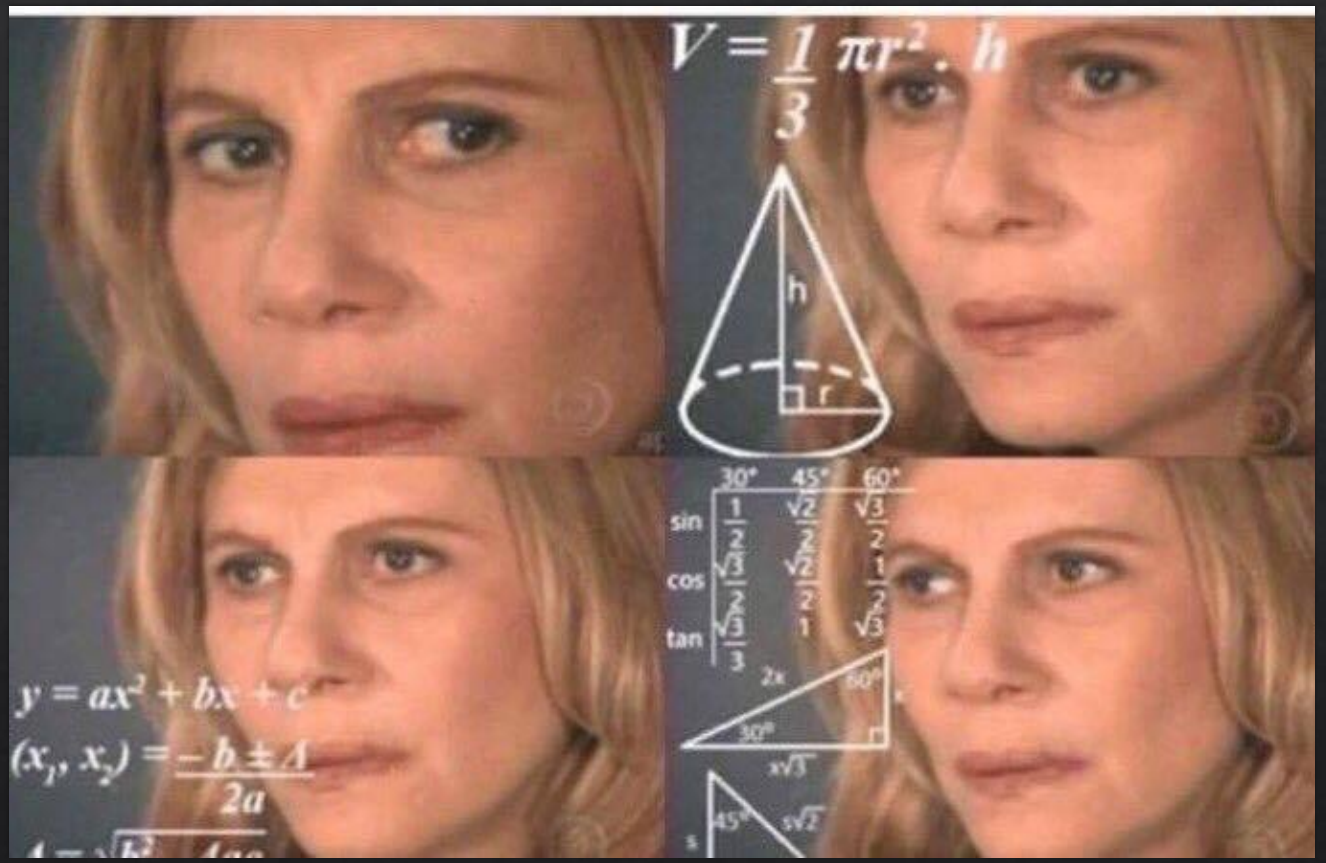
Kansas v. Glover

Kansas v. Glover

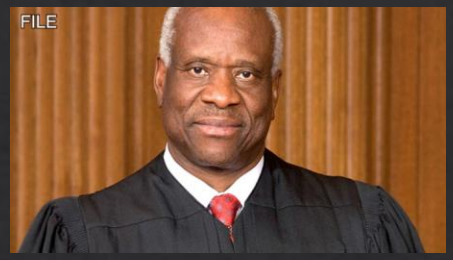
Kansas v. Glover

- Reasonable suspicion: “a particularized and objective basis for suspecting the particular person stopped of criminal activity.” *United States v. Cortez* (U.S. 1981)
- More than a “mere hunch,” but “considerably less than” preponderance, and less than probable cause. *Prado Navarette v. California* (U.S. 2014)
- Does not require certainty. *Illinois v. Wardlow* (U.S. 2000)
- Depends on “factual and practical considerations of everyday life on which reasonable and prudent men” act.
- Permits “commonsense judgments and inferences about human behavior.”

Kansas v. Glover



Kansas v. Glover

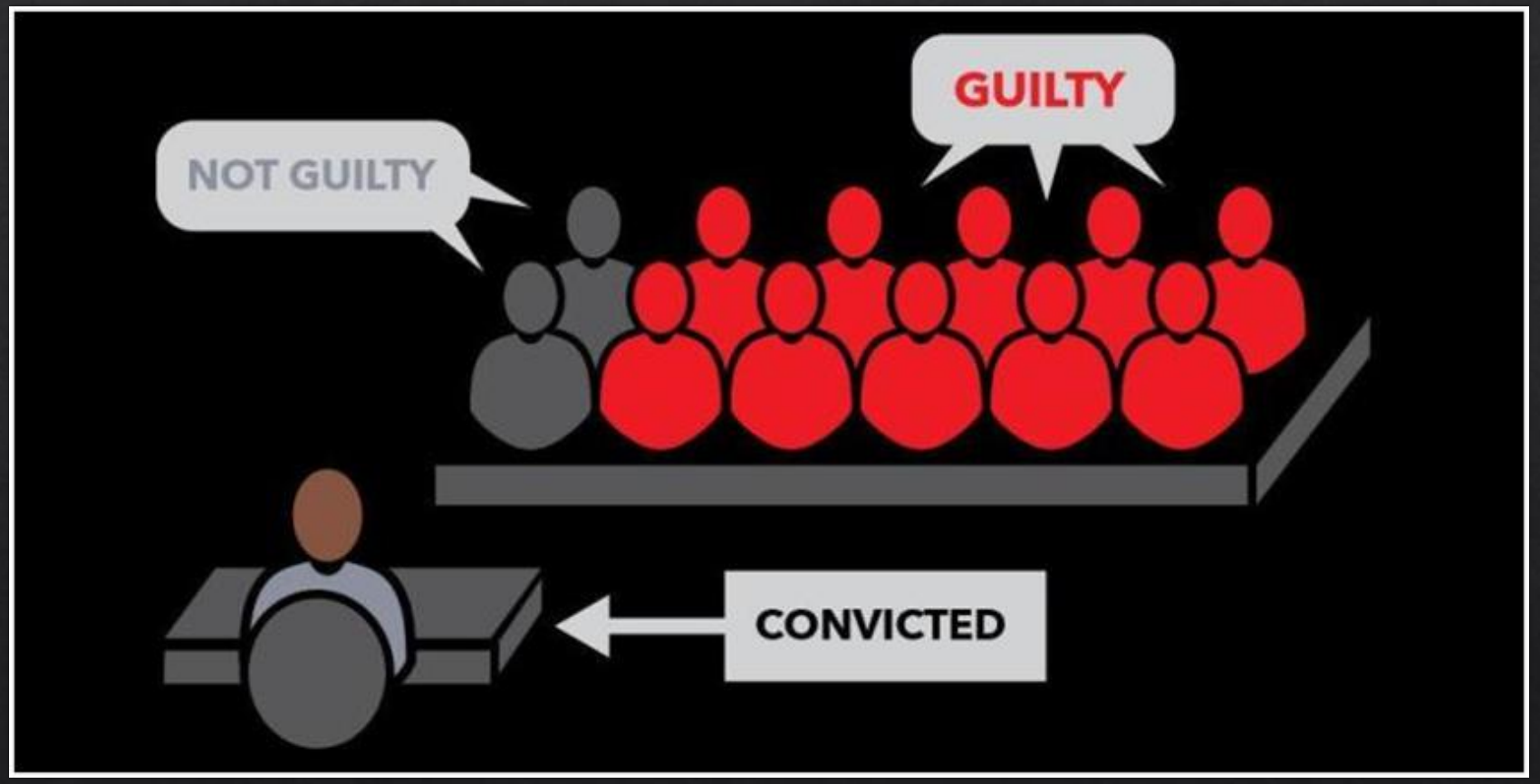


- It's reasonable and common sense to believe that the owner is driving their own car.
  - This is particularly true in Kansas, where most reasons for suspending licenses deal with traffic offenses, including priors for driving on suspension
- Doesn't matter that
  - Sometimes people drive cars they don't own
  - Owner's license was suspended—in fact, people routinely drive when their license is suspended or revoked
  - There's no specific law enforcement training or experience that imparts this knowledge

Kansas v. Glover

- BUT…"the presence of additional facts might dispel reasonable suspicion"
  - If owner is a man, but cop sees woman driving
  - If owner is old, but cop sees young person driving
  - Etc.

Ramos v. Louisiana



Ramos v. Louisiana

- Question: Does the Sixth Amendment require States to have unanimous verdicts in criminal cases?
- Answer: Sure does.

Ramos v. Louisiana

Ramos v. Louisiana

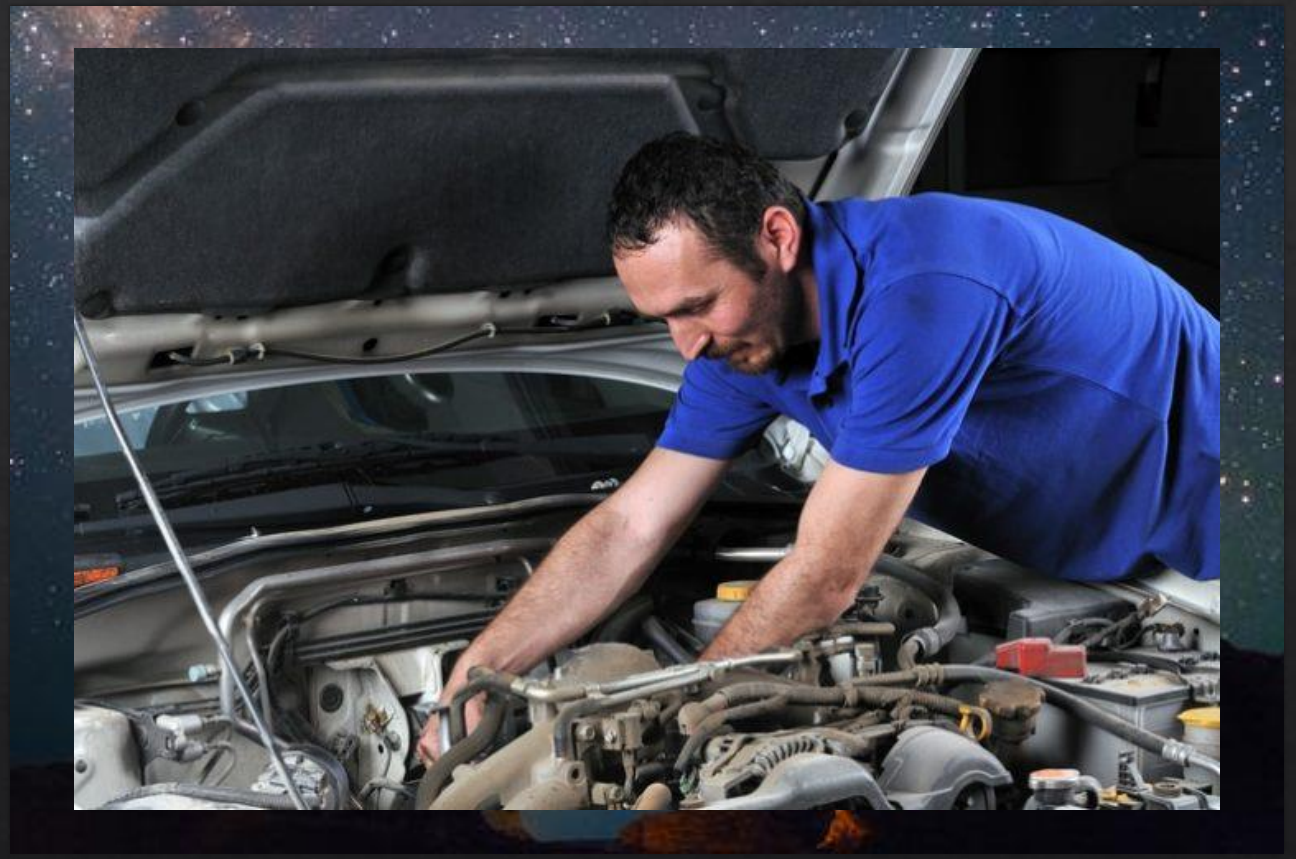
Ramos v. Louisiana

State v. Lujan

State v. Lujan

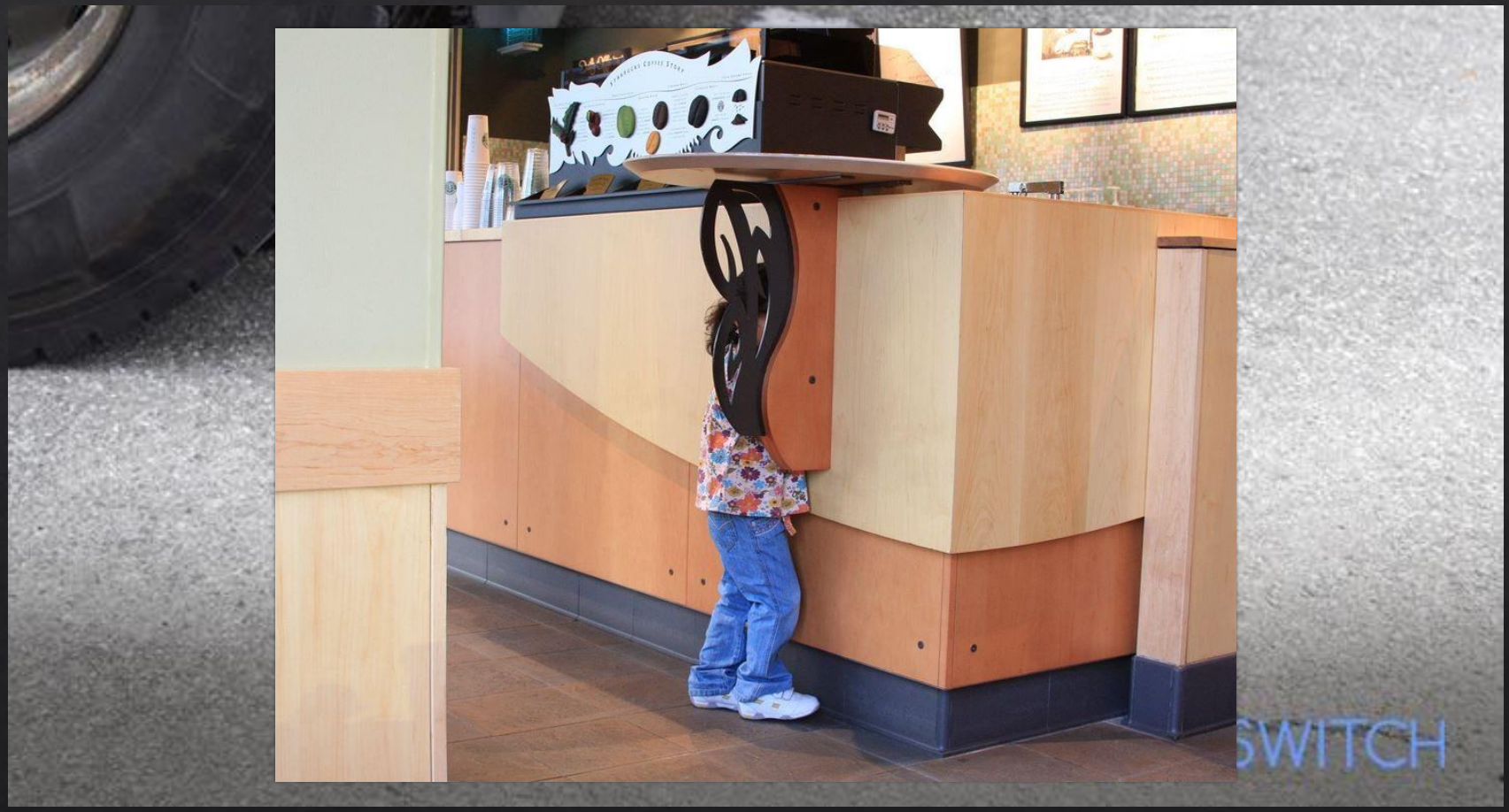
- Question: What's the new test for eyewitness identification under the Utah Constitution?
- Answer: We'll talk about it. But become familiar with new evidence rule 617.

State v. Lujan



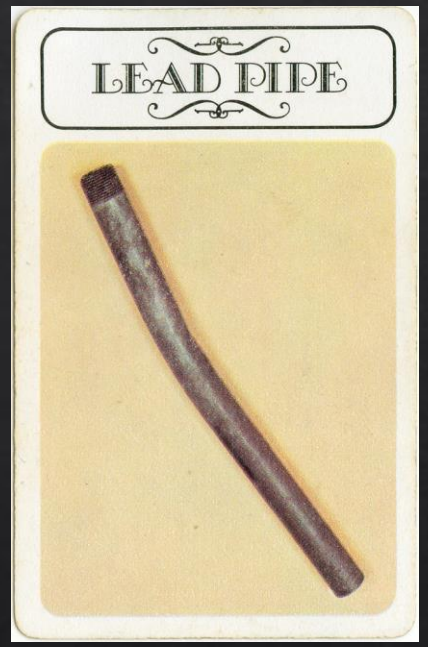
State v. Lujan

State v. Lujan

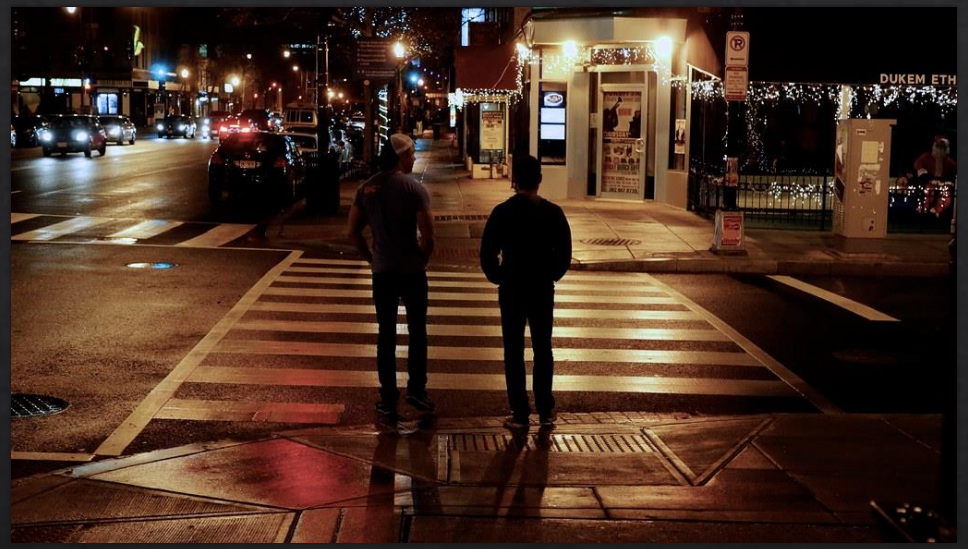


State v. Lujan

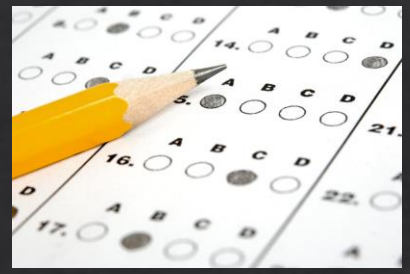
State v. Ramirez



State v. Ramirez



State v. Ramirez



- Federal test: identifications must be sufficiently reliable to be admitted into evidence. Unreliability requires both (1) police misconduct creating an unncessarily suggestive environment and (2) an irreparable likelihood of misidentification. *Manson v. Brathwaite* (U.S. 1977)
  - Consider several factors: opportunity to observe, degree of attention, accuracy of description, level of certainty, length of time. *Neil v. Biggers* (U.S. 1972)
- State test: Given *Long* (eyewitness identification instruction case), we need to adjust federal standard
  - Consider more factors, including whether identification was spontaneous and consistent versus the product of suggestion, the nature of the event (ordinary v. extraordinary), each actor's race

State v. Lujan

State v. Lujan

State v. Lujan

- Rule 617. Eyewitness identification
- (a) Definitions
  - (1) "Eyewitness identification" means testimony or conduct in a criminal trial that identifies the defendant as the person who committed a charged crime.
  - (2) "Identification procedure" means a lineup, photo array, or showup.
  - (3) "Lineup" means a live presentation of multiple individuals, before an eyewitness, for the purpose of identifying or eliminating a suspect in a crime.
  - (4) "Photo array" means the process of showing photographs to an eyewitness for the purpose of identifying or eliminating a suspect in a crime.
  - (5) "Showup" means the presentation of a single person to an eyewitness in a time frame and setting that is contemporaneous to the crime and is used to confirm or eliminate that person as the perceived perpetrator.

State v. Lujan

- (b) Admissibility in General. In cases where eyewitness identification is contested, the court shall exclude the evidence if the party challenging the evidence shows that the factfinder, considering the factors in subsection (b), could not reasonably rely on the eyewitness identification.

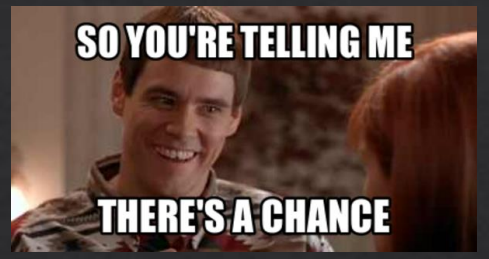
State v. Lujan

- In making this determination, the court may consider, among other relevant factors, expert testimony and other evidence on the following:
  - (1) Whether the witness had an adequate opportunity to observe the suspect committing the crime;
  - (2) Whether the witness's level of attention to the suspect committing the crime was impaired because of a weapon or any other distraction;
  - (3) Whether the witness had the capacity to observe the suspect committing the crime, including the physical and mental acuity to make the observation;
  - (4) Whether the witness was aware a crime was taking place and whether the awareness affected the witness's ability to perceive, remember, and relate it correctly;

State v. Lujan

- (5) Whether a difference in race or ethnicity between the witness and suspect affected the identification;
- (6) The length of time that passed between the witness's original observation and the time the witness identified the suspect;
- (7) Any instance in which the witness either identified or failed to identify the suspect and whether this remained consistent thereafter;
- (8) Whether the witness was exposed to opinions, photographs, or any other information or influence that may have affected the independence of the witness in making the identification; and
- (9) Whether any other aspect of the identification was shown to affect reliability.

State v. Lujan



- (c) Identification Procedures. If an identification procedure was administered by law enforcement and the procedure is contested, the court must determine whether the identification procedure was unnecessarily suggestive or conducive to mistaken identification. If so, the eyewitness identification must be excluded unless the court, considering the factors in subsection (b) and this subsection (c), finds that there is not a substantial likelihood of misidentification.

State v. Lujan

- (1) Photo Array or Lineup Procedures. To determine whether a photo array or lineup is unnecessarily suggestive or conducive to mistaken identification, the court should consider the following:
  - (A) Double Blind. Whether law enforcement used double blind procedures in organizing a lineup or photo array for the witness making the identification. If law enforcement did not sue double blind procedures, the court should consider the degree to which the witness's identification was the product of another's verbal or physical cues.

State v. Lujan

- (B) Instructions to Witness. Whether, at the beginning of the procedure, law enforcement provided instructions to the witness that
  - (i) the person who committed the crime may or may not be in the lineup or depicted in the photos
  - (ii) it is as important to clear a person from suspicion as to identify a wrongdoer;
  - (iii) the person in the lineup or depicted in a photo may not appear exactly as he or she did on the date of the incident because features such as weight and head and facial hair may change; and
  - (iv) the investigation will continue regardless of whether an identification is made.

State v. Lujan

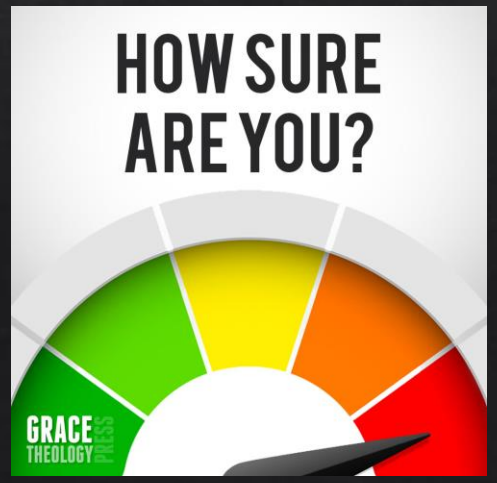
- (C) Selecting Photos or Persons and Recording Procedures. Whether law enforcement selected persons or photos as follows:
  - (i) Law enforcement composed the photo array or lineup in a way to avoid making a suspect noticeably stand out, and it composed the photo array or lineup to include persons who match the witness's description of the perpetrator and who possess features and characteristics that are reasonably similar to each other, such as gender, race, skin color, facial hair, age, and distinctive physical features;

State v. Lujan

- (ii) Law enforcement composed the photo array or lineup to include the suspected perpetrator and at least five photo fillers or five additional persons
- (iii) Law enforcement presented individuals in the lineup or displayed photos in the array using the same or sufficiently similar process of formatting;
- (iv) Law enforcement used computer generated arrays where possible;
- (v) Law enforcement recorded the lineup or photo array procedures.

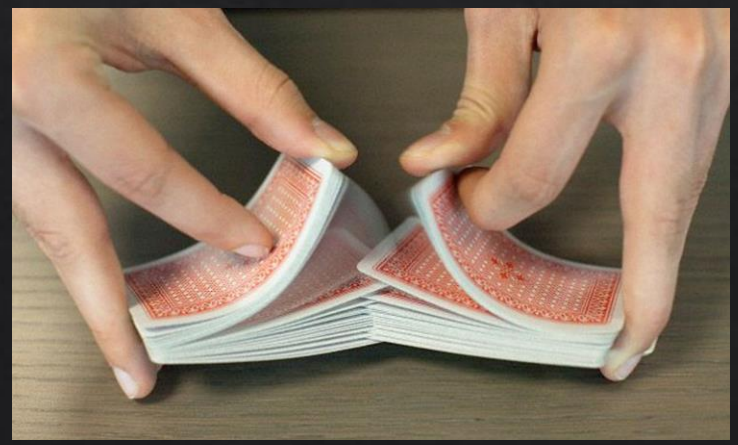
State v. Lujan

- (D) Documenting Witness Response.
  - (i) Whether law enforcement timely asked the witness how certain he or she was of any identification and documented all responses, including initial responses; and
  - (ii) Whether law enforcement refrained from giving any feedback regarding the identification.

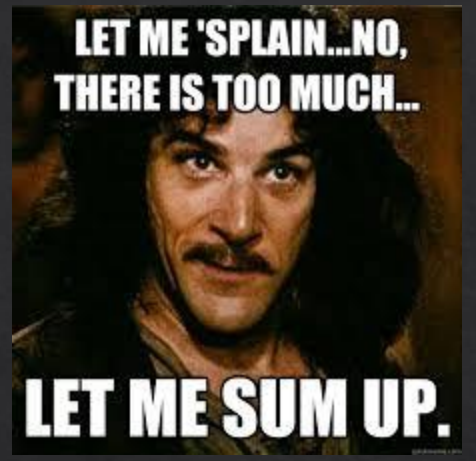


State v. Lujan

- (E) Multiple Procedures or Witnesses.
  - (i) Whether or not law enforcement involved the witness in multiple identification procedures wherein the witness viewed the same suspect more than once; and
  - (ii) Whether law enforcement conducted separate identification procedures for each witness, and the suspect was placed in different positions in each separate procedure.



State v. Lujan



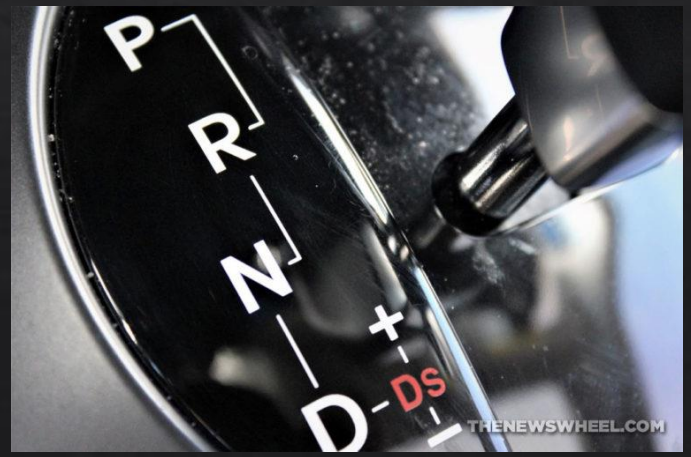
- Double blind.
- No verbal or physical cues.
- Tell witness that the perp may or may not be there, that clearing the innocent is as important as identifying the guilty, that the person may look different, and that you'll keep investigating regardless of what they do.
- Use at least a six-pack with similar-looking people in similar-looking pictures, computer-generated if possible, and take note of all your steps here.
- Record all responses, including initial responses, and don't give any feedback.
- For multiple line-ups, shuffle the pictures around.

State v. Lujan

- (2) Showup procedures. To determine whether a showup is unnecessarily suggestive or conducive to a mistaken identification, the court should consider the following:
  - (A) Whether law enforcement documented the witness's description prior to the showup.

State v. Lujan

- (B) Whether law enforcement conducted the showup at a neutral location as opposed to law enforcement headquarters or any other public safety building and whether the suspect was in a patrol car, handcuffed, or physically restrained by police officers.
- (C) Whether law enforcement instructed the witness that the person may or may not be the suspect.



State v. Lujan

- (D) Whether, if the showup was conducted with two or more witnesses, law enforcement took steps to ensure that the witnesses were not permitted to communicate with each other regarding the identification of the suspect.
- (E) Whether the showup was reasonably necessary to establish probable cause.
- (F) Whether law enforcement presented the same suspect to the witnesses more than once.
- (G) Whether the suspect was required to wear clothing worn by the perpetrator or to conform his or her appearance in any way to the perpetrator.

State v. Lujan

- (H) Whether the suspect was required to speak any words uttered by the perpetrator or perform any actions done by the perpetrator.

State v. Lujan

- (I) Whether law enforcement suggested, by any words or actions, that the suspect is the perpetrator.
- (J) Whether the witness demonstrated confidence in the identification immediately following the procedure and law enforcement recorded the confidence statement.

State v. Lujan

- (3) Other Relevant Circumstances. In addition to the factors for procedures described in parts (1) and (2) of this subsection (c), the court may evaluate an identification procedure using any other circumstance that the court determines is relevant.

State v. Lujan

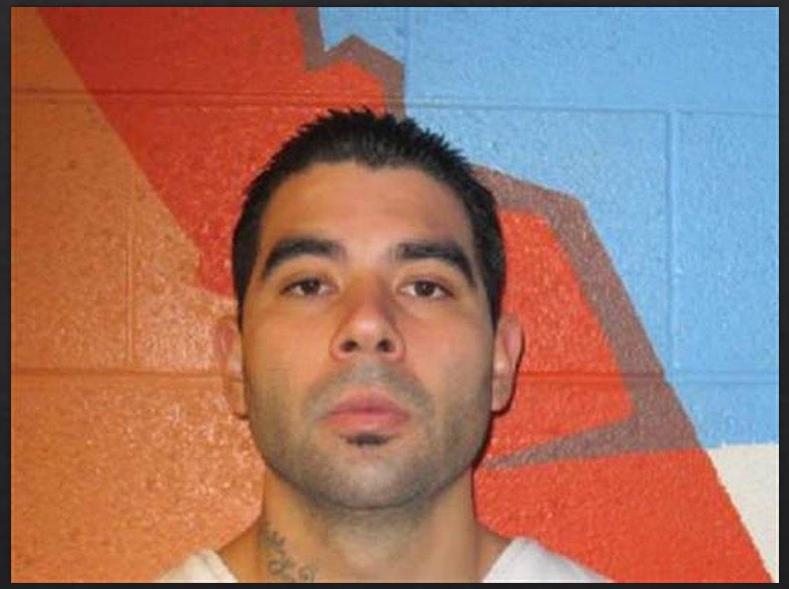
State v. Grunwald

State v. Grunwald

- Question: Do prosecutors need to be extra-special careful with jury instructions, and elements instructions in particular?
- Answer: Very yes.

State v. Grunwald

State v. Grunwald



State v. Grunwald

State v. Grunwald

State v. Grunwald

State v. Grunwald

State v. Grunwald

State v. Grunwald

State v. Grunwald

- Utah Code § 76-2-202: "Every person, acting with the mental state required for the commission of an offense . . . who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable[.]"
- Accomplice must have mental state required for the principal offense, *State v. Jeffs* (Utah 2010), unless they are convicted of a lesser offense, *State v. Idrees* (Utah Ct. App. 2014).

State v. Grunwald

- Jury could convict if it found that Grunwald "recognized that her conduct could result in Garcia committing the crime of aggravated murder but chose to act anyway."
- Jury could convict if it found that Grunwald "intentionally aided Garcia, who committed the crime."
- Jury could convict if it found that Grunwald intentionally aided Garcia and "was aware that his conduct was reasonably certain to result in his committing the crime of aggravated murder."

State v. Grunwald

- Instruction had recklessness standard: Grunwald recognized her conduct could result in Garcia committing [the offenses] but chose to act anyway.
- Intentional aid was not directly linked to the murder.
- Knowing mental state was focused on Garcia's actions, not Grunwald's.

State v. Grunwald

State v. Grunwald

- Did the error create the possibility that the jury convicted based on factual findings that would not have resulted in conviction had the instructions been correct?
  - That is, did the instructions create at least one wrong path to conviction?
- If so, is there a reasonable probability that the jury based its verdict on those findings?
  - Look at the facts and arguments, decide if it's reasonably likely that the jury actually took that path.

State v. Grunwald

- Maybe they thought she was just reckless.
- Maybe they thought that she intended to aid Garcia, but did not intend for him to commit murder.
- Maybe they thought that she knew that Garcia would commit murder, but did not know that her actions created that risk.

State v. Grunwald

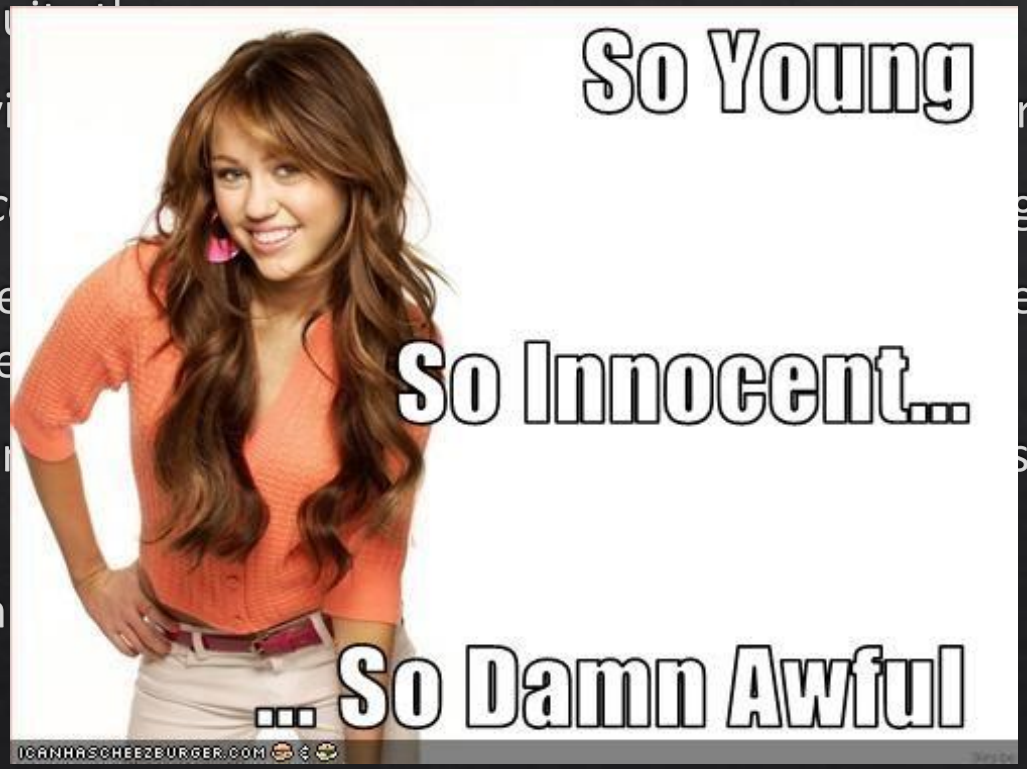
- “Buck” is not a common term for shooting, could be reasonably misunderstood.
- The windows in the truck were tinted, it’s impossible to tell what was going on in there, and we only have Grunwald’s account of what happened. No direct evidence contradicting it.
- Grunwald has a learning disability, was very young and impressionable.

State v. Grunwald

- One bright spot: accomplice liability does not require but for causation—it doesn't matter that the principal would have done the crime without the accomplice's efforts.

State v. Grunwald

- Grunwald admitted that Garcia pulled out a gun and said he was going to "buck [Wride] in the f***ng head." No ambigu
- She knew Garcia had a vi rison.
- She was upset with *polic* g freed from a captor.
- Her testimony was entire everal minutes for traffic to clear before the
- No need for direct evide stantial evidence will do just fine.
- She kept assisting him in



State v. Murphy

State v. Murphy

- Question 1: Is evidence of prior sexual assault allegations admissible to rebut a fabrication charge?
- Answer 1: Yes, for now.

State v. Murphy

State v. Murphy

State v. Murphy

State v. Murphy

State v. Murphy

- Rule 404(b): Crimes, Wrongs, or Other Acts.
  - (1) Prohibited uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character.
  - (2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. [ ]
    - Non-inclusive list; can be for just about anything other than character, such as to rebut a claim of fabrication, *State v. Verde* (Utah 2012)
    - The purpose must be genuinely in dispute at trial.

State v. Murphy

- 401: Relevant?
  - Really low bar, *State v. Richardson*, Utah 2013; relevant or not)
  - Not determined in a vacuum—the question is whether it's relevant to show the proper non-character purpose
- 403: Does the danger for unfair prejudice substantially outweigh the probative value?
  - Unlike 401, this weighs degrees of relevance against degrees of danger for unfair prejudice.

State v. Murphy

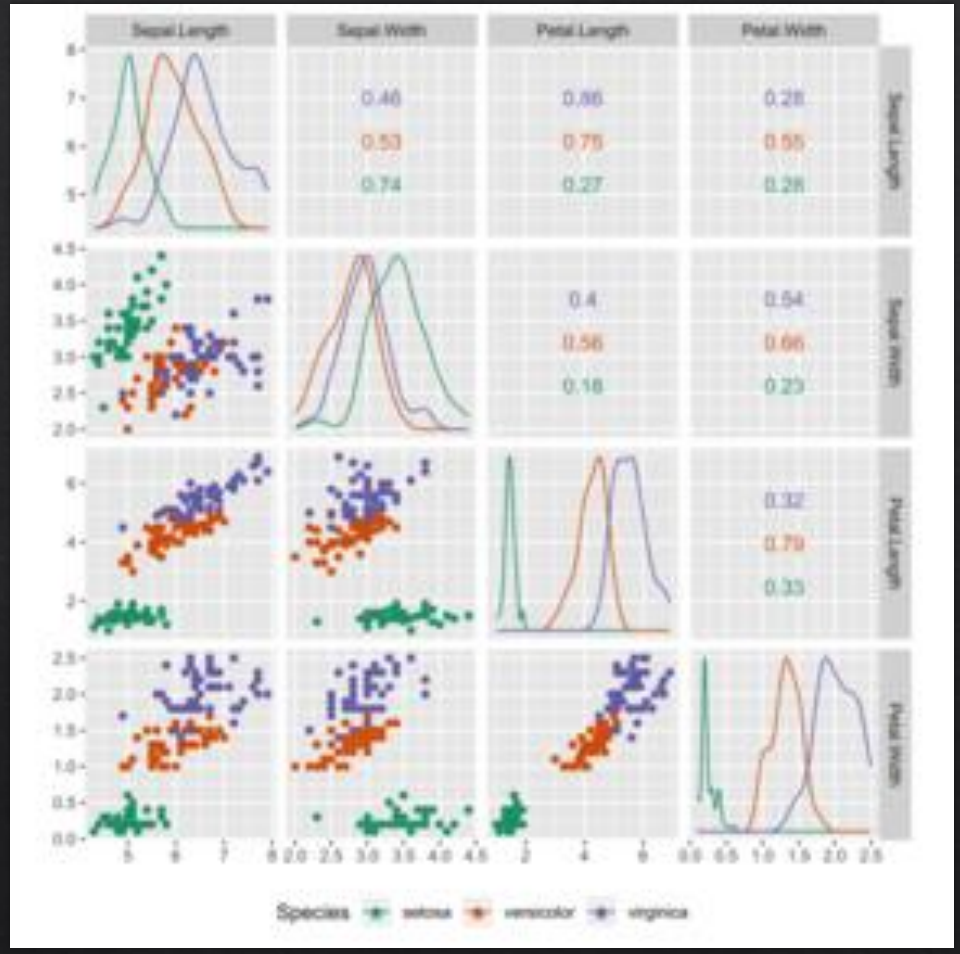
- Doctrine of chances
  - Materiality: in “bona fide dispute”
  - Independence: do the accusers know each other?
  - Similarity: how much in common?
  - Frequency: how often does this happen to the average person?

State v. Murphy

State v. Murphy

- MM: While out on bail for crimes against V, D hired a prostitute (MM) to give him a massage. After a "happy ending," a drunk D tried to get her underwear off and assaulted her.
- AK: Friend of D in Kentucky; AK got drunk, passed out, woke up to pants off; D forced her to give him oral sex, then to sign a document saying she consented to it. He then raped her.
- AM: AM was the daughter of one of D's friends; he came to her house drunk one night, climbed on top of her in her bed. She was able to escape to a neighbor's house, where D broke in and tried to molest her.
- GM: D married to GM, but separated. Broke into her house, drunk, sexually assaulted her. Two months later while out on bail, broke in and sexually assaulted her again, but she shot him five times.

State v. Murphy



State v. Murphy

- Rule 403: go by language of the rule, not by a set of certain factors (the old days of *Shickles*), *State v. Lowther* (Utah 2017)
  - This can include the old *Shickles* factors or *Verde* doctrine of chance factors, if applicable; can also include anything else that's relevant
  - But focus on the overall test
- Trial court:
  - This was very helpful; odds that all these women are lying are low
  - This isn't going to confuse the jury where there are limiting instructions.
- Court of appeals
  - Yeah, we buy that.

State v. Murphy

- A cornerstone principle of Anglo-American law is to be judged by what you did in what you're accused of, not your past.
- The rule has so many exceptions (proper, non-character purposes, some blanket admissibility rules like 404(c)), that we forget the underlying principle.

State v. Murphy

- In sex assault cases, prior acts evidence comes in all the time, even though we don't have a rule (like other jurisdictions) making it admissible for propensity.
- The doctrine of chances makes sense in some instances (rebutting mistake or accident), but only shows propensity when used to rebut fabrication defense, because there is no "rare misfortune" happening—that is, something that the person is not responsible for.
- This use also violates a principle that parties can't put on evidence bolstering evidence.

State v. Murphy

- Judge Orme: “I am more comfortable with our established jurisprudence concerning the doctrine of chances than are some of my colleagues.” *State v. Richins* (Utah Ct. App. 2020).

State v. Ahmed

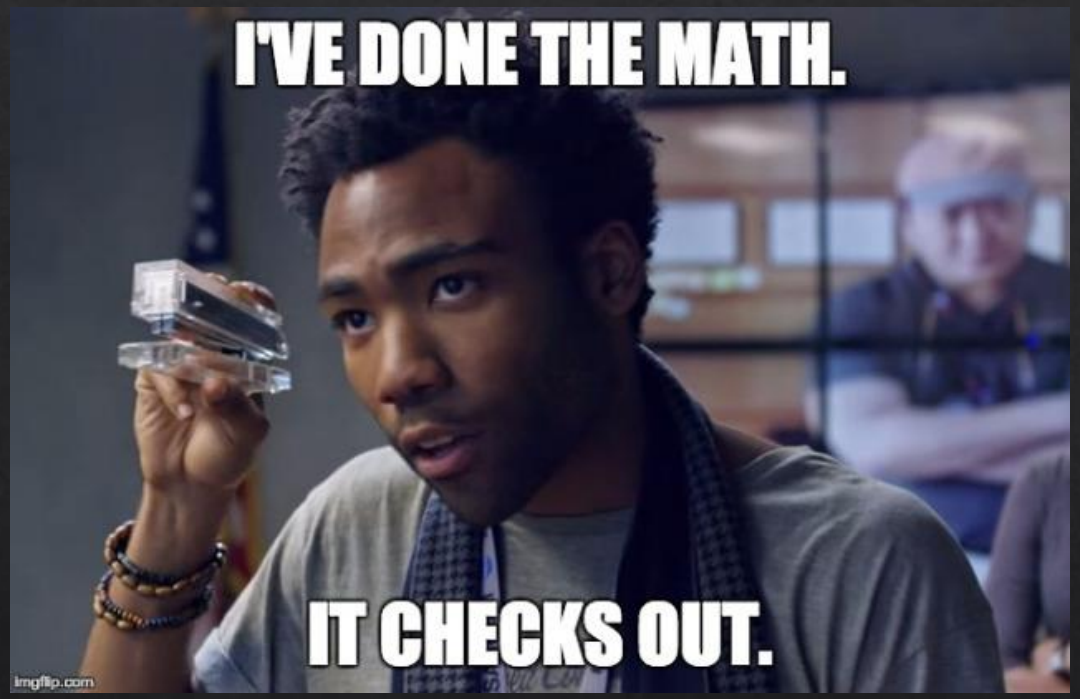
State v. Ahmed

- Question: Must prosecutors disclose surveillance locations when a Defendant requests it?
- Answer: Yes, because there is no surveillance location privilege in Utah.

State v. Ahmed

State v. Ahmed

State v. Ahmed



State v. Ahmed

State v. Ahmed

State v. Ahmed

State v. Ahmed

- Rule 16. Discovery
- (a) Disclosures by prosecutor. Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which the prosecutor has knowledge:
- (a)(1) relevant written or recorded statements of the defendant or codefendants;
- (a)(2) the criminal record of the defendant
- (a)(3) physical evidence seized from the defendant or codefendant
- (a)(4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and
- (a)(5) any other item of evidence which the court determines on good cause should be made available to the defendant in order for the defendant to adequately prepare a defense.

State v. Ahmed

State v. Ahmed

State v. Ahmed

- Utah R. Evid. 501:
  - A claim of privilege to withhold evidence is governed by:
    - The Constitution of the United States;
    - The Constitution of the State of Utah;
    - These rules of evidence;
    - Other rules adopted by the Utah Supreme Court;
    - Decisions of the Utah Courts; and
    - Existing statutory provisions not in conflict with the above.

State v. Ahmed

- No basis in Utah law for privilege.
- This could tend to negate Ahmed's guilt, and thus should be disclosed under rule 16(a)(4); it could also affect his ability to cross-examine the surveilling officer, see if he could really see what he said he saw.
- Can't limit cross without a valid basis, and without a privilege, there is no valid basis.
- Remand to see if knowing the location would have made any difference.

State v. Wright

State v. Wright

- Question: Is counsel ineffective for not discussing the evidence supporting the elements of a crime before a defendant pleads guilty?
- Answer: Yes, if the evidence is lacking.

State v. Wright

State v. Wright


Yes...that's what killing you means.

State v. Wright

State v. Wright

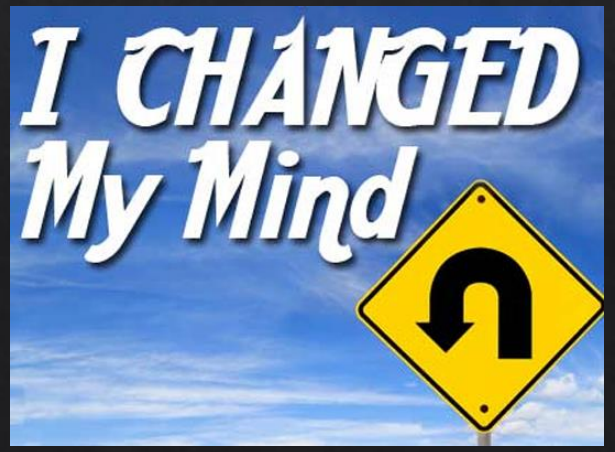
State v. Wright

State v. Wright

State v. Wright

State v. Wright

- *Strickland v. Washington* (U.S. 1984) requires both deficient performance and prejudice.
- Deficient performance requires doing something completely unreasonable. *Premo v. Moore* (U.S. 2011).
- Prejudice is usually outcome-determinative (reasonable likelihood of different result); but in plea cases, they need to show a reasonable likelihood that they would have not pled guilty and instead gone to trial, *Jae Lee v. United States* (U.S. 2017).



State v. Wright

- Failure to advise about lack of factual basis for plea (no detention for agg kidnapping)
- State's theories: (1) pushing mother back into chair during fight; (2) not opening garage door until she agreed to lie to doctors.
- Court:
  - She could have left, and the pushing was just incident to the assault because it was "assaultive rather than restrictive," so counsel was deficient.
  - Court was "confident" that had counsel raised the issue, either D wouldn't have plead or "more likely," the prosecutor would have offered a better plea deal (he wouldn't).

State v .Wright

State v. Bess

State v. Bess

- Question 1: Are self-defense and performance-of-duties elements of brandishing or affirmative defenses?
- Answer 1: Affirmative defenses.
- Question 2: Does rule 606 (generally forbidding use of juror affidavits to impeach a verdict) violate the state or federal constitution?
- Answer 2: Nope.
- Question 3: Is the MUJI deadlock instruction coercive?
- Answer 3: Not on these facts, and probably not generally.

State v. Bess

State v. Bess


WELCOME TO
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PROMONTORY POINT
FARMINGTON BAY WATERFOWL MANAGEMENT AREA
FARMINGTON
SALT LAKE CITY
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State v. Bess

State v. Bess

State v. Bess

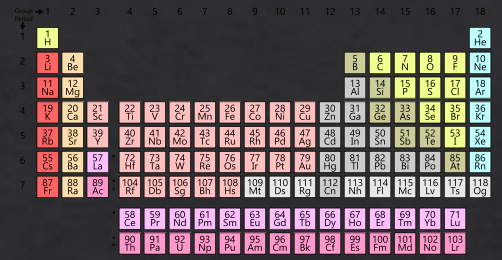
State v. Bess

State v. Bess

State v. Bess

- Utah Code § 76-10-506: [A]n individual who, in the presence of two or more individuals, and not amounting to [aggravated assault], draws or exhibits a dangerous weapon in an angry and threatening manner or unlawfully uses a dangerous weapon in a fight or quarrel is guilty of a class A misdemeanor.
  - This section does not apply to an individual who, reasonably believing the action to be necessary in [self-defense or defense of others]
  - This section does not apply to [a peace officer] in performance of the individual's duties

State v. Bess

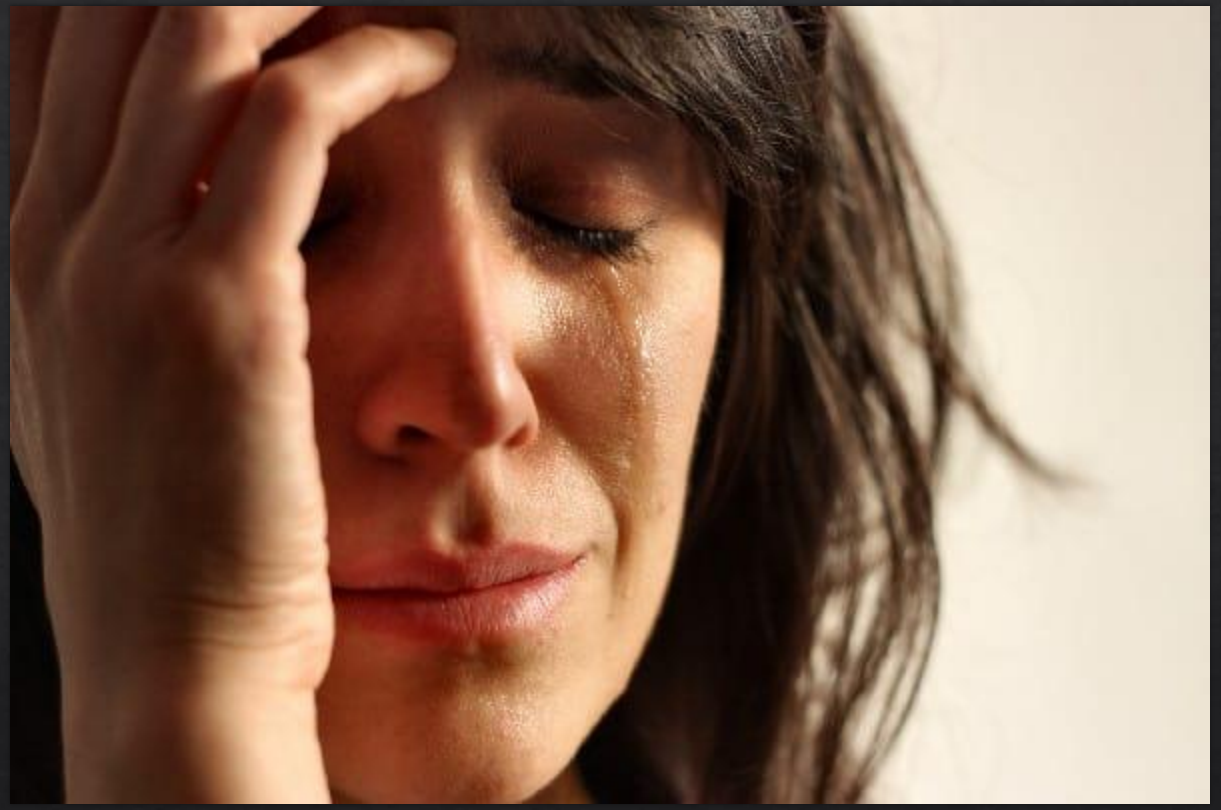


- The State needs to prove each element of an offense beyond a reasonable doubt, *In re Winship* (U.S. 1970).
- Affirmative defenses do not arise until there is some evidence to support them. *State v. Drej* (Utah 2010).
- Once there is some evidence to support them, the State has to disprove them beyond a reasonable doubt. *Mullaney v. Wilbur* (U.S. 1975).
  - Most common affirmative defenses: self-defense (perfect and imperfect).
  - Different rules for things like special mitigation, on which the defense bears the burdens of both production and persuasion.

State v. Bess

- Self-defense and performance of duties are exemptions, which are traditionally viewed as affirmative defenses. *State v. Smith* (Utah 2005)
- And defendants are in the better position to know whether they apply—they have access to the information necessary to show them.

State v. Bess



State v. Bess

- Utah R. Evid. 606(b): During an inquiry into the validity of a verdict . . . a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental process concerning the verdict . . . . The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

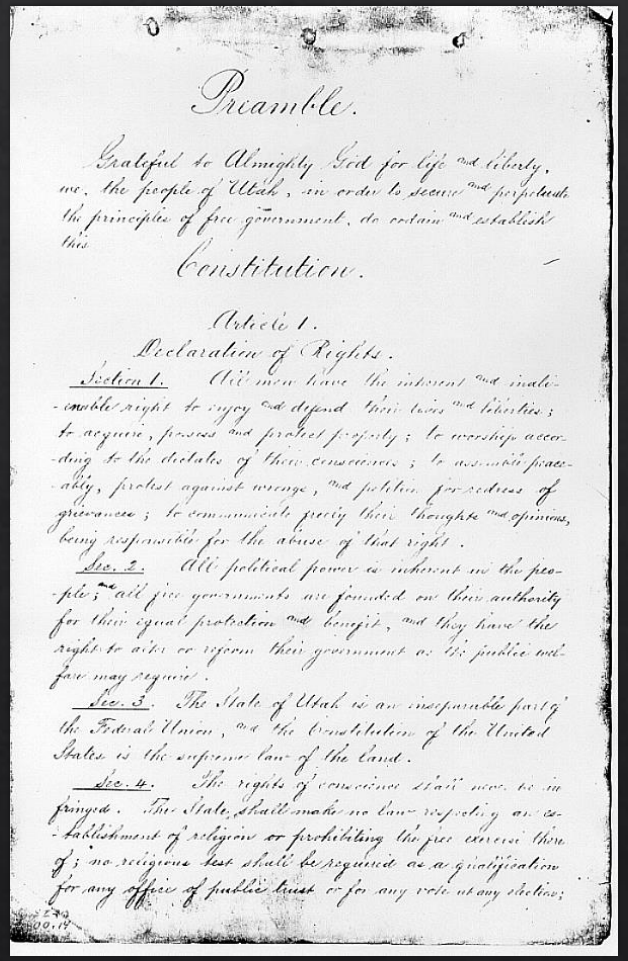
State v. Bess

- *Pena-Rodriguez v. Colorado* (U.S. 2017): Sixth Amendment requires that non-impeachment rule give way to allegations of racial bias.

State v. Bess

State v. Bess

State v. Bess



Preamble.

Grateful to Almighty God for life and liberty, we, the people of Utah, in order to secure and perpetuate the principles of free government, do ordain and establish this

Constitution.

Article 1.

Declaration of Rights.

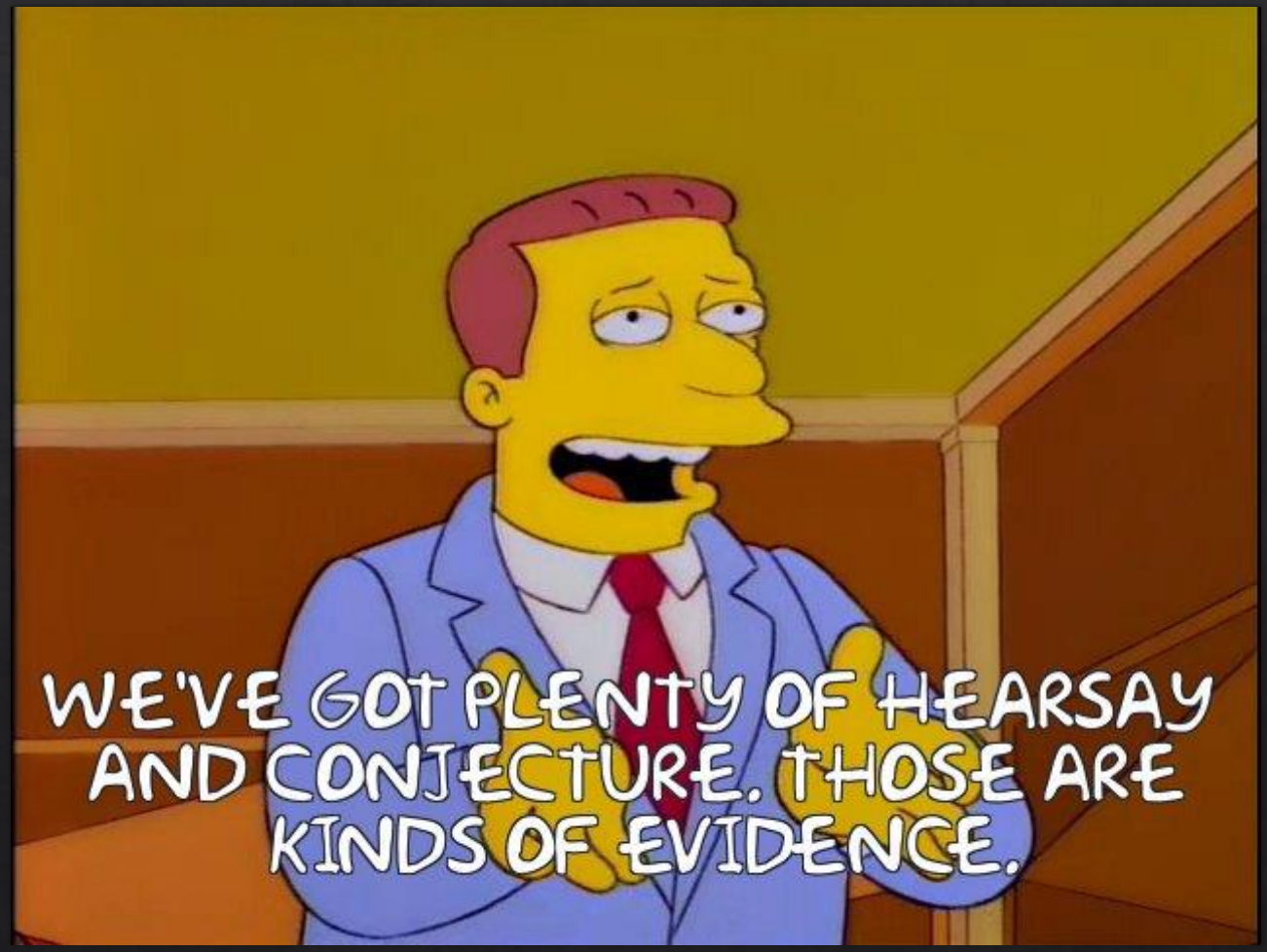
Section 1. All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.

Sec. 2. All political power is inherent in the people; and all free governments are founded on their authority for their equal protection and benefit, and they have the right to alter or reform their government as the public welfare may require.

Sec. 3. The State of Utah is an indissoluble part of the Federal Union, and the Constitution of the United States is the supreme law of the land.

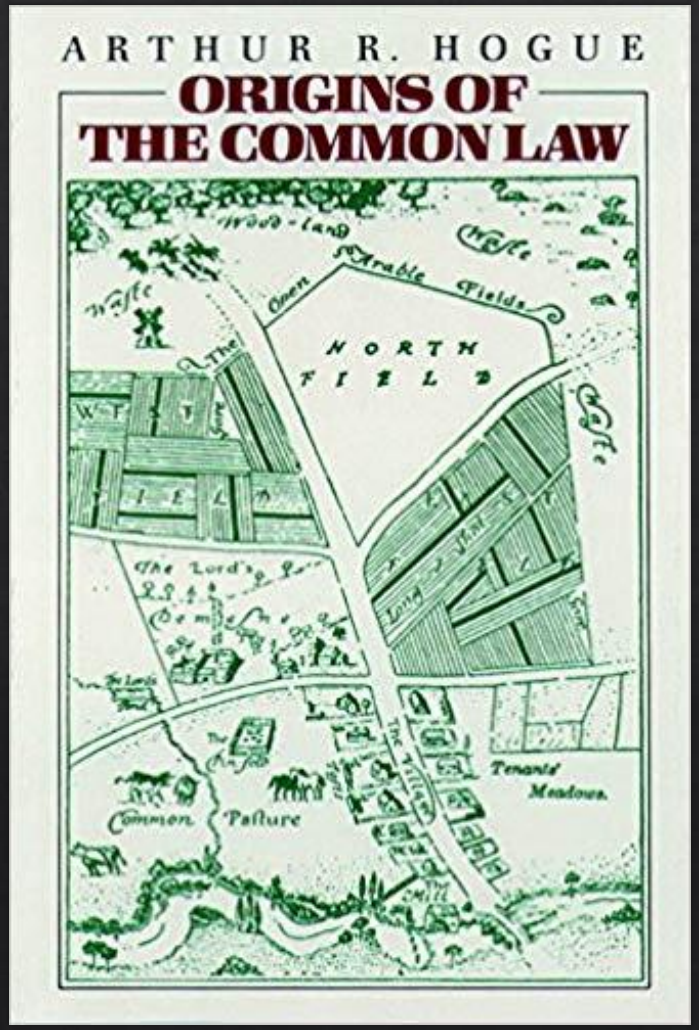
Sec. 4. The rights of conscience shall never be infringed. The State shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; no religious test shall be required as a qualification for any office of public trust or for any vote at any election;

State v. Bess


WE'VE GOT PLENTY OF HEARSAY AND CONJECTURE. THOSE ARE KINDS OF EVIDENCE.

State v. Bess

State v. Bess


ARTHUR R. HOGUE
ORIGINS OF
THE COMMON LAW
Wood-Land
Waste
Open Arable Fields
NORTH
FIELD
Waste
The Lord's
Tenants'
Meadows
Common Pasture

State v. Bess

- *Allen v. United States* (U.S. 1896): you can give deadlock instructions so long as they aren't coercive.
- Consider
  - 1. Language of instruction
  - 2. Circumstances of the case

State v. Bess

- The verdict must represent the considered judgement of each juror. In order to return a verdict, it is necessary that each juror agree. Your verdict must be unanimous. It is your duty to consult with one another and to deliberate. Your goal should be to reach agreement. . .if you can do so without surrendering your individual judgment. Each of you must decide this case for yourself, but do so only after impartially considering the evidence with your fellow jurors. Do not hesitate to reexamine your own views and change your position if you are convinced that [it] is a mistake. But do not surrender your honest conviction[s].

State v. Bess

- Jury deliberated for three hours before instruction and three hours after instruction
- Jury poll was unanimous
- Instruction not per se coercive
- Bess wanted court to consider affidavit of juror to show coercion, but that was inadmissible as explained

State v. Sanders

Lawyer: my client is trapped inside a penny

Judge: what?

Lawyer: he's in a cent

Judge: you're going to jail with him

State v. Sanders

- Question: Is innocent possession a defense to possession of a firearm by a restricted person?
- Answer: Not outside the confines of the statute.

State v. Sanders

State v. Sanders

State v. Sanders

State v. Sanders

State v. Sanders

State v. Sanders

State v. Sanders

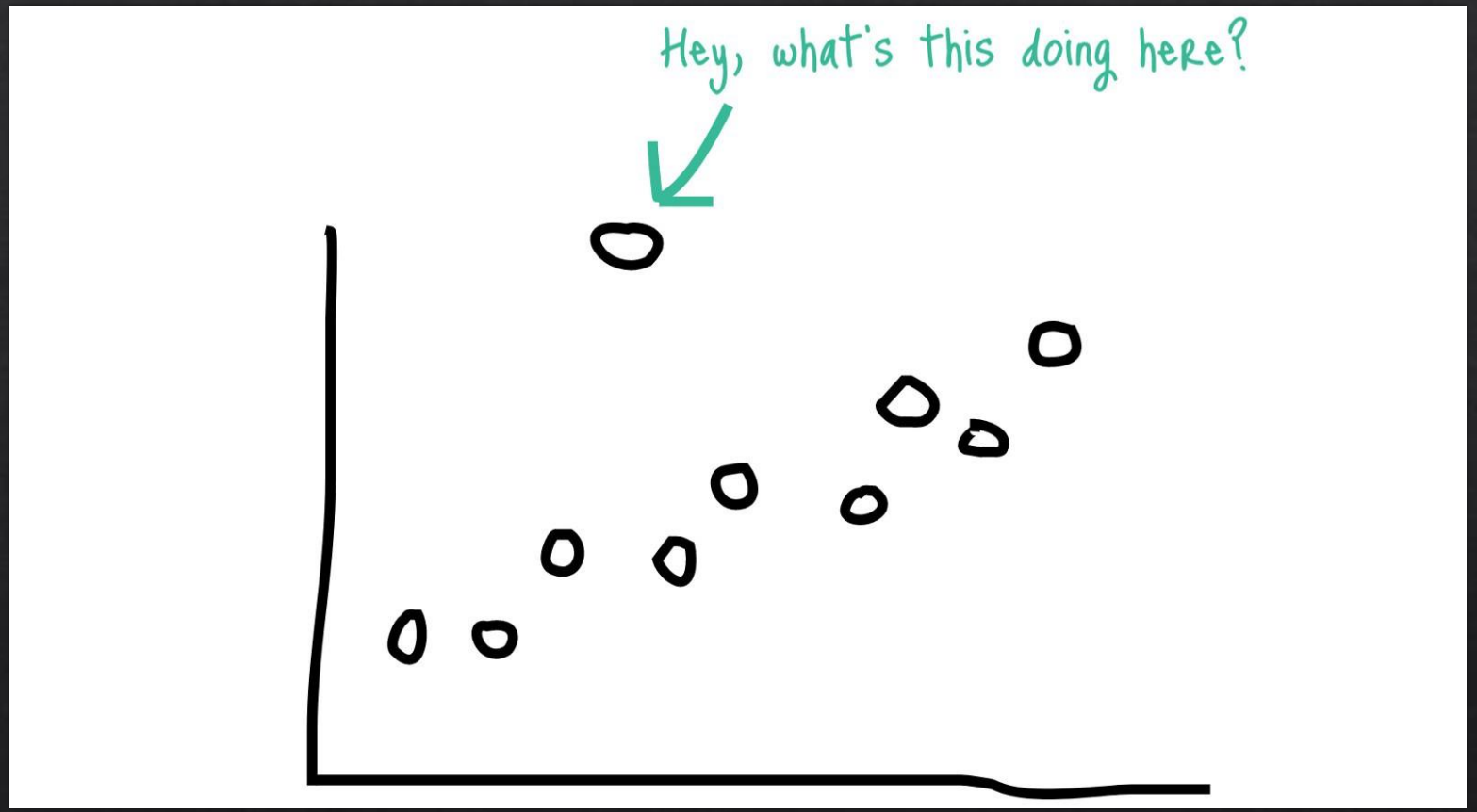
- State v. Miller (Utah 2008): innocent possession is a thing for drug cases.

State v. Sanders

State v. Sanders

- A category II restricted person who intentionally or knowingly purchases, transfers, possesses, uses, or has under the person's custody or control any firearm is guilty of a third-degree felony.
- It is an affirmative defense that the firearm was possessed by the person before they became restricted, was not used in a crime, was not being held as evidence, and was transferred to a lawful possessor within 10 days of the restriction being imposed.

State v. Sanders



State v. Sanders

State v. Clyde

State v. Clyde

- Question: Is giving just Gatorade to a severely dehydrated woman for four days sufficient to show probable cause for criminal negligence?
- Answer: Yep.

State v. Clyde

State v. Clyde

State v. Clyde

- Monday: Madison said she was throwing up a bit and probably had the flu; Clyde didn't believe her: "Chick, you do some serious drugs and I know you're lying to me." An earlier drug test showed opiates in her system. Clyde gave her some Gatorade.
- Tuesday: Madison feeling worse, not looking good, weaker. Constant nausea, vomiting, diarrhea. Rx: more Gatorde.
- Wednesday: Madison too sick to get out of bed; "didn't look normal." Insisted she was not detoxing, just had stomach bug. More Gatorade.
- Thursday: Physician's assistant shows for weekly rounds; Madison unresponsive, died. Weighed 87 pounds.

State v. Clyde

- Utah Code § 76-5-206: Criminal homicide constitutes negligent homicide if the actor, acting with criminal negligence, causes the death of another.
- Utah Code § 76-2-103(4): Criminal negligence: where the defendant ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

State v. Clyde

- Standard is “relatively low”; same as for an arrest warrant
- Warrant a person a reasonable caution that an offense was committed and D did it.

State v. Clyde

- Medical examiner: V died of “profound dehydration”; could have been treated with IV
- Clyde’s interview: she knew the right protocol was to monitor, do dehydration tests, tell physician’s assistant
- Registered nurse: four days of vomiting and diarrhea should trigger IV use, PA notification, possibly hospitalization; not doing these thing was “a deviation from the standard of care” expected from nurses

State v. Clyde

- Enough to establish standard of care from D's testimony alone, which the RN further supported.
- Magnitude of risk depends in part on seriousness of consequence. Where consequence is death, even a small likelihood could create substantial and unjustifiable risk.
- Gross deviation permissibly inferred from evidence.

State v. Harvey

State v. Harvey

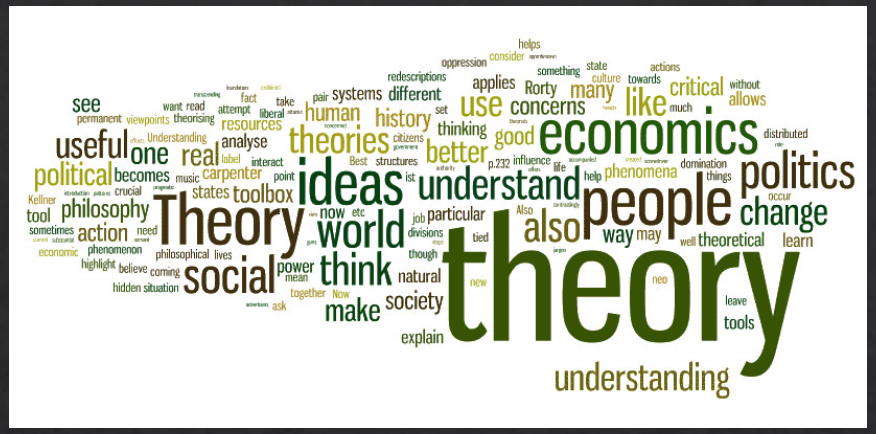
- Question: Can an officer testify about the alcohol burnoff rate that he/she learned at the police academy?
- Answer: Nope.

State v. Harvey

State v. Harvey

State v. Harvey

State v. Harvey



- Utah Code § 41-6a-502
  - .08 BAC (now, .05) at time of the test
  - .08/.05 at time of actual physical control or operation
  - Under the influence of alcohol to a degree that renders person incapable of safely operating the vehicle

State v. Harvey

- State: Didn’t defend ruling.
- Court: Good call, State. Hearing something at the police academy does not make one an expert on burn-off rates, which requires scientific training and expertise.
- State: but it was harmless because unable-to-safely-operate evidence was overwhelming.
- Court: Was not!
  - No driving pattern (driving for an extra block and a half and stopping at a red light doesn’t cut it).
  - D passed one test and had plausible explanations for performing badly on walk-and-turn (leg and ankle injuries), and a lot of sober people fail that test anyway.
  - Refusal not enough.

State v. De La Rosa

State v. De La Rosa

- Question: Can a court grant a new trial motion without identifying the basis for granting the motion, and no particular ground is apparent from the motion?
- Answer: No.

State v. De La Rosa

- Rule 24. **Motion for new trial.**
- The court may, upon motion of a party or its own initiative, grant a new trial in the interest of justice if there is any error or impropriety which had a substantial adverse effect upon the rights of a party.

State v. De La Rosa

- Constructive possession jury instruction
- 404(b) evidence about prior possession and distribution
- Juror misconduct (jurors heard discussing case during recess)
- Retail theft should have been severed from drug case
- Trial counsel was ineffective for not filing motion to suppress evidence from vehicle search

State v. De La Rosa

- The Court, having reviewed Defendant's Motion for a New Trial, the State's Opposition to Defendant's Motion for a New Trial, and Defendant's Amended Motion for a New Trial, makes the following ruling: Defendant's Motion is granted.

State v. De La Rosa

- When there are multiple potential bases for granting a new trial motion, the court needs to say which it is relying on.
- If there is just one, then it's apparent, but that's not what happened here.
- This is the kind of motion that trial courts get deference on, but an appellate court can't grant deference if there's no analysis. Abuse of discretion review implies there's something to review.

State v. Escobar-Florez

State v. Escobar-Florez

- Question: Is the State entitled to a flight instruction where, after the victim discloses abuse, the defendant moves, breaks two appointments to speak to police, and disappears for nearly a decade?
- Answer: Yes.

State v. Escobar-Florez

State v. Escobar-Florez

- Moved out of the house
- Quit his job, saying that he was having “trouble with the police”
- Agreed twice to meet with police and tell his side of the story, then broke both appointments
- Could not be found for nearly a decade

State v. Escobar-Florez

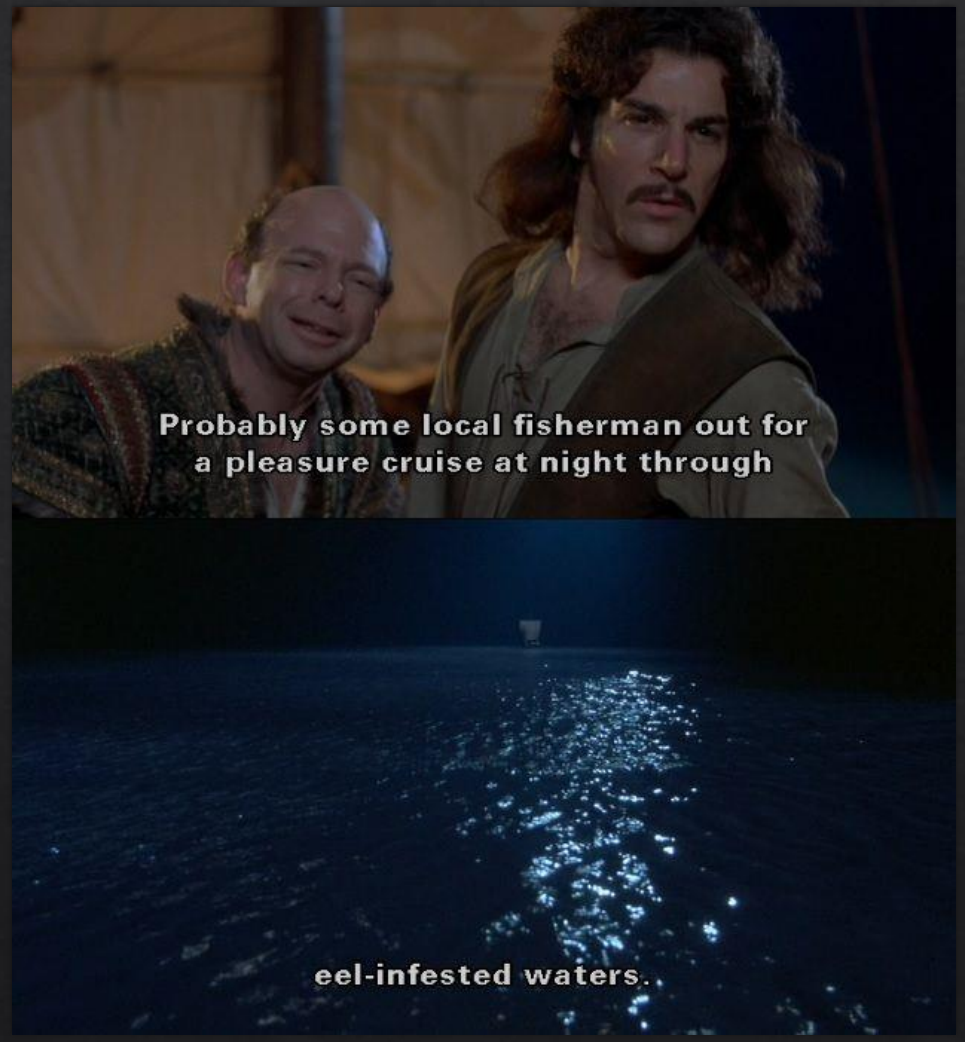
Evidence was introduced at trial that the defendant may have fled or attempted to flee from the crime scene or after having been accused of the crime. This evidence alone is not enough to establish guilt. However, if you believe that evidence, you may consider it along with the rest of the evidence in reaching a verdict. It's up to you to decide how much weight to give that evidence.

Keep in mind that there may be reasons for flight that could be fully consistent with innocence. Even if you choose to infer from the evidence that the defendant had a guilty conscience, that does not necessarily mean he is guilty of the crime charged.

State v. Escobar-Florez

The wicked flee when no man pursueth; but the righteous are as bold as a lion. Proverbs 28:1

State v. Escobar-Florez



State v. Escobar-Florez

- Flight can show a guilty conscience, *State v. LoPrinzi* (Utah Ct. App. 2014)
- Need not be immediately after offense is committed or police begin an investigation.
- Need not actually be flight, but can be laying low, *see State v. Madrid* (Utah Ct. App. 1999)

State v. Escobar-Florez

State v. Ciccolelli and State v. Archuleta

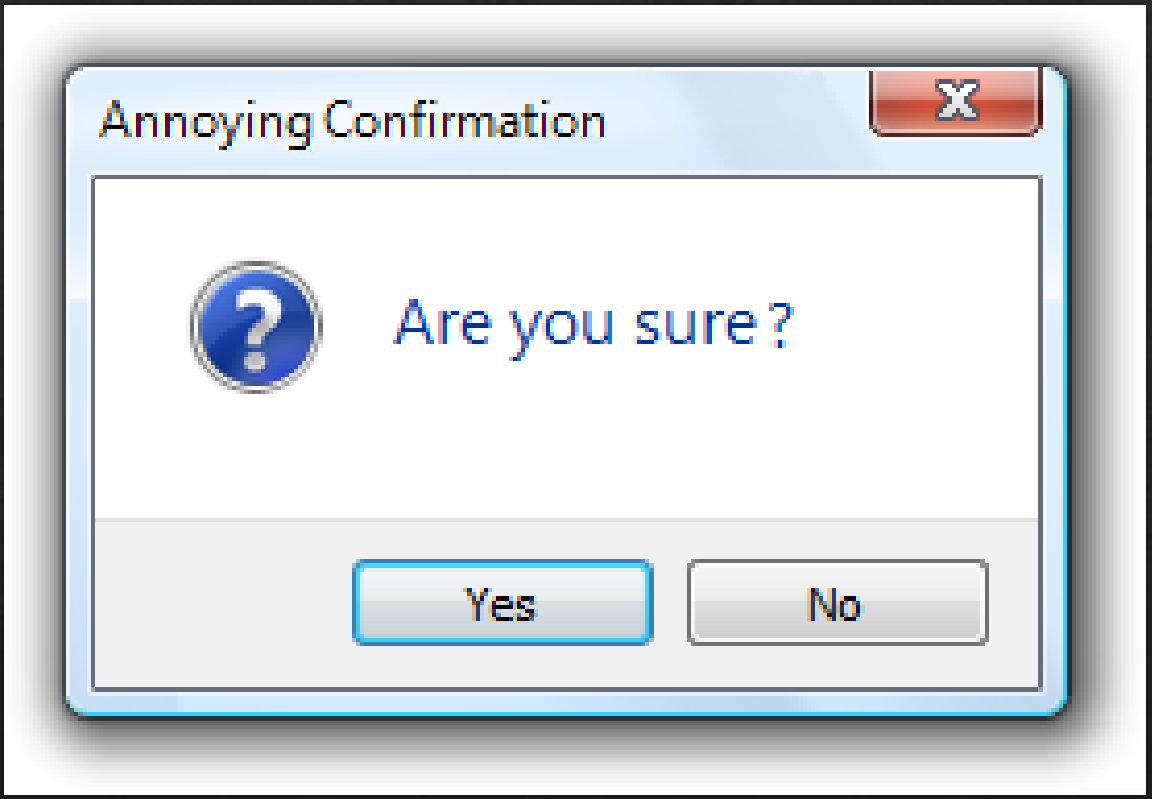
State v. Ciccolelli and State v. Archuleta

- Question: Is the defendant's claim to have been intoxicated during a change-of-plea hearing enough to show that his plea was unknowing and involuntary?
- Answer: Nope.

State v. Ciccolelli

State v. Ciccolelli

State v. Ciccolelli



State v. Ciccolelli

State v. Archuleta

State v. Archuleta

State v. Archuleta

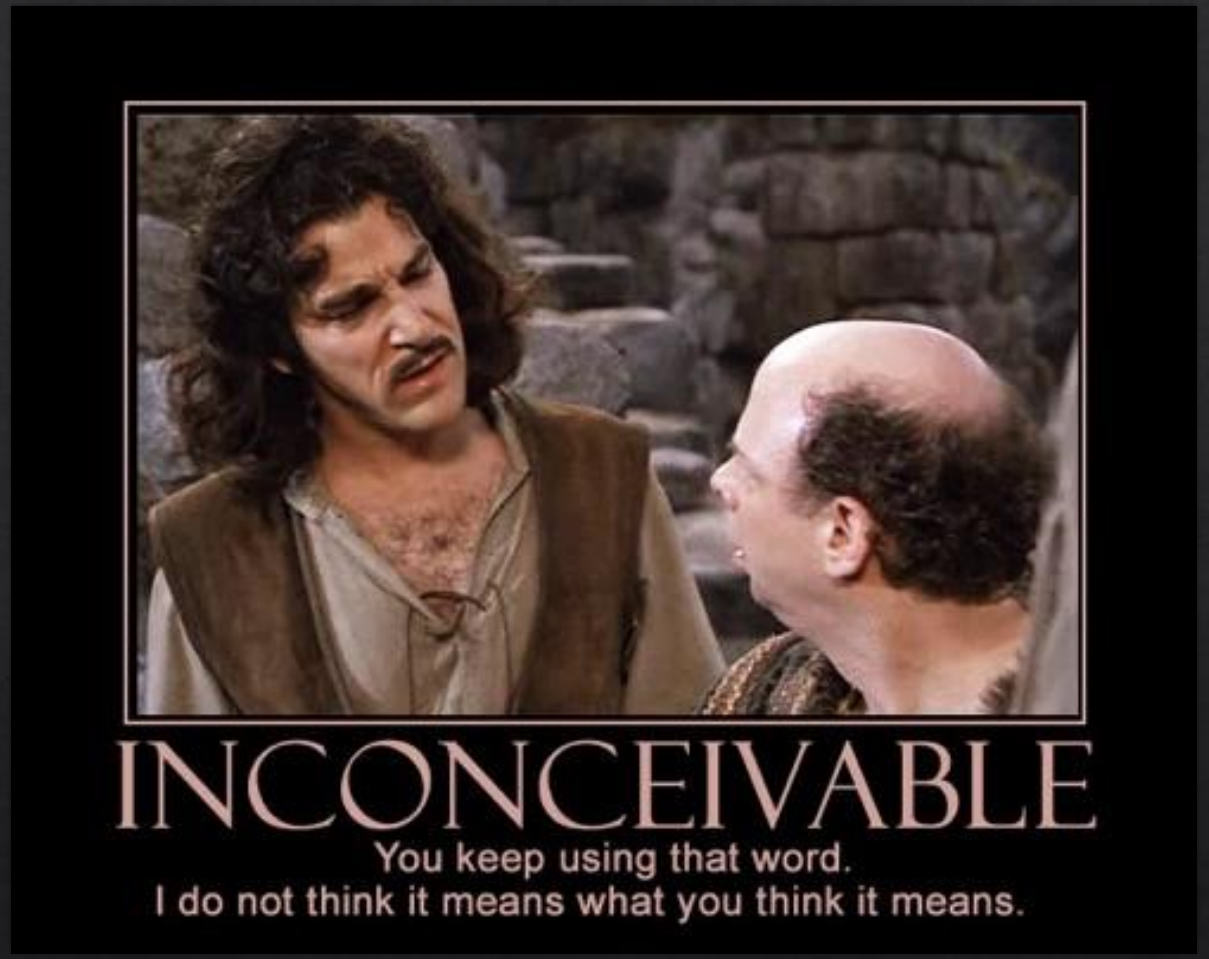
State v. Archuleta

State v. Ciccolelli and State v. Archuleta

- Federal due process requires pleas to be made knowingly, voluntarily, intelligently, with sufficient awareness of the relevant circumstances and likely consequences. *State v. Alexander* (Utah 2012) (this is why we have rule 11)
- Utah Code § 77-13-6(2)(a): plea cannot be withdrawn unless D shows it was "not knowingly and voluntarily made."

State v. Ciccolelli and State v. Archuleta

State v. Jok


INCONCEIVABLE
You keep using that word.
I do not think it means what you think it means.

State v. Jok

- Question: Are some inconsistencies in a victim's story enough to render his/her testimony inherently improbable?
- Answer: Nope.

State v. Jok

State v. Jok

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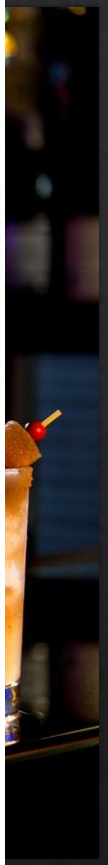
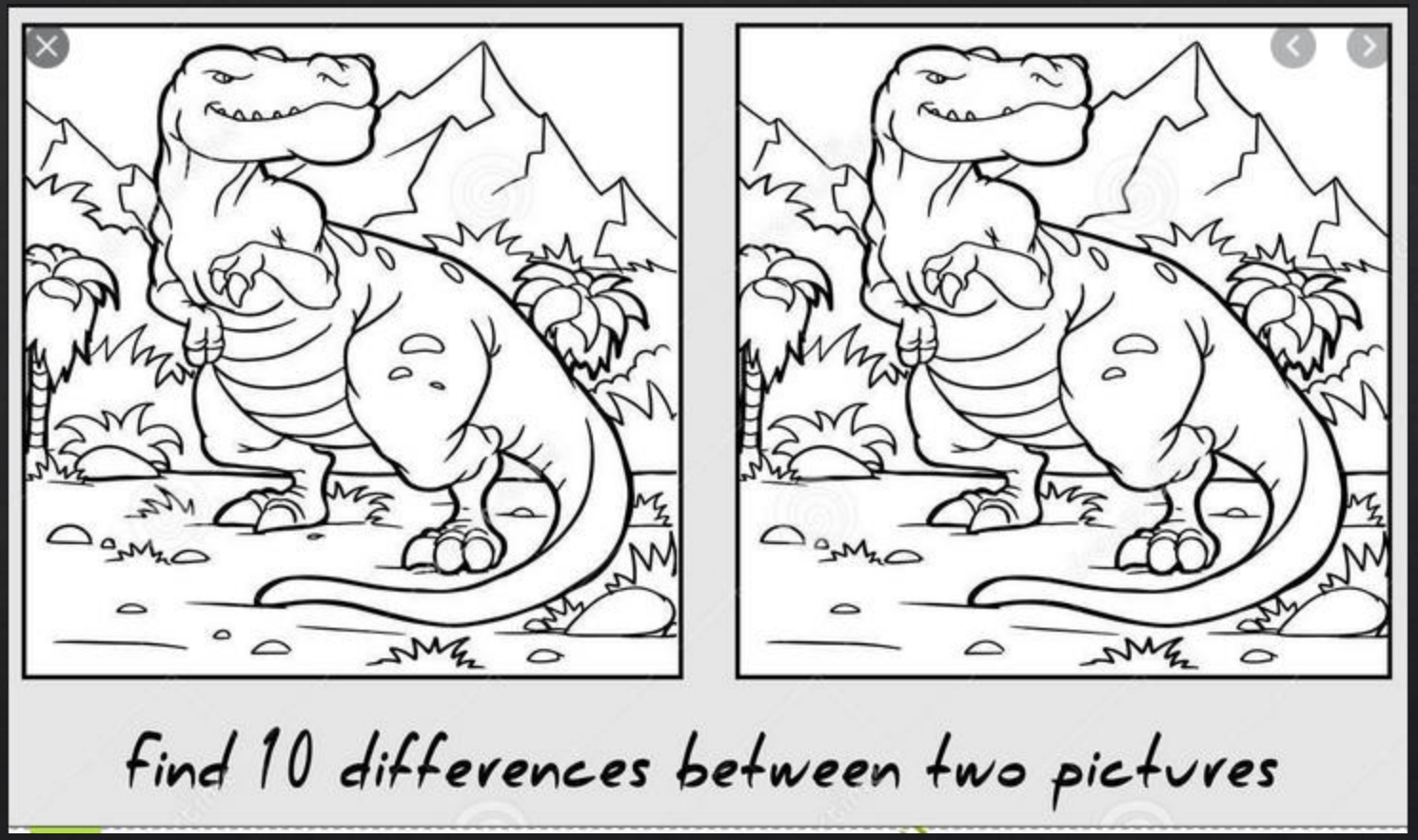
Features, materials, finishes and layout of subject unit may be different than shown. 3DPlans.com

State v. Jok



State v. Jok

State v. Jok



State v. Jok

- *State v. Robbins* (Utah 2009)
- *State v. Prater* (Utah 2017)
- Need:

  Material inconsistencies in testimony +

  Patent falsities +

  Lack of corroboration—no other circumstantial or direct evidence of guilt

State v. Jok

- Inconsistencies: yes, but not material (peripheral issues).
  - Case also contains language saying that trial testimony must be internally inconsistent, not just inconsistent with other statements. Mortensen appears ready to walk this language back, so always argue in the alternative.
- Patent falsity: can't rely on "unfounded stereotype[s]" about victim behavior; just because a rape victim goes to sleep near the rapist does not mean that she was not raped.
- Corroboration: "our inherent-improbability case law does not require evidence corroborating the specific-offense conduct or elements of the offense." Partial corroboration is enough; need to show "a complete lack of any additional evidence supporting the verdict" to prevail on this claim.
  - Here, Jok and Akok were at V's apartment, stayed after roommate went to sleep; V reported details to nurse next day; V had injuries; DNA showed that Akok raped her

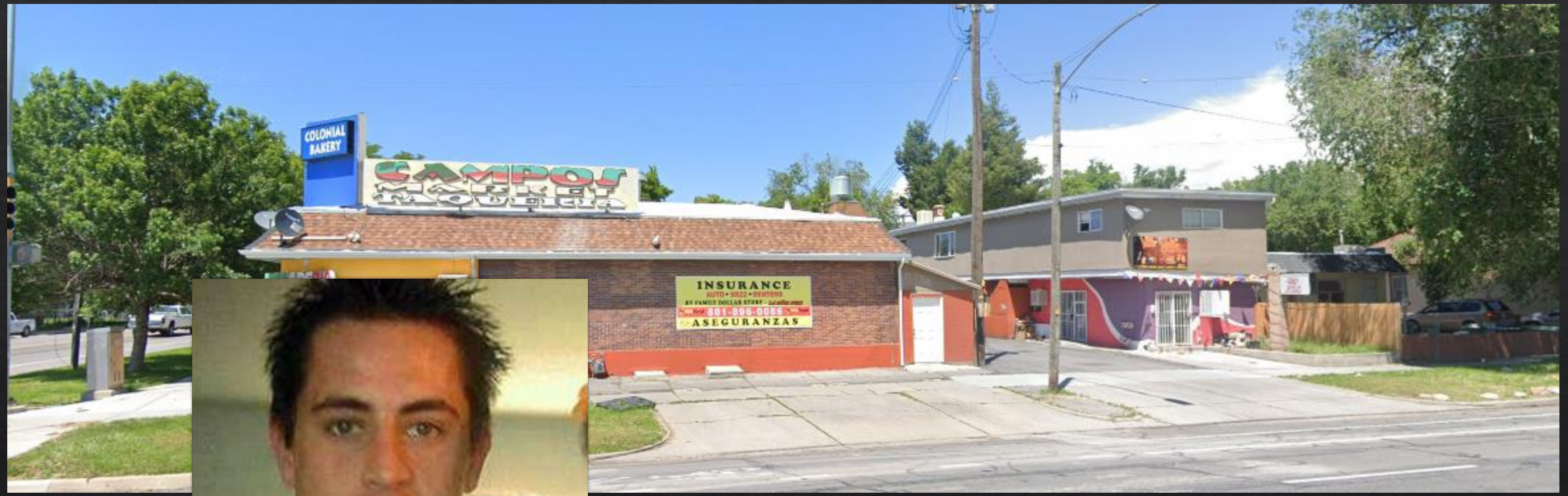
State v. Sosa-Hurtado

State v. Sosa-Hurtado

- Question 1: Does the great-risk-of-death aggravator apply only to a murderous act, or does it consider the immediate surrounding circumstances?
- Answer 1: It takes circumstances before and after into account.
- Question 2: Does a placeholder new trial motion allow later supplementation without limit?
- Answer 2: Nope.

State v. Sosa-Hurtado

State v. Sosa-Hurtado



State v. Sosa-Hurtado

State v. Sosa-Hurtado

- Utah Code § 76-5-202(1)(c): Criminal homicide constitutes aggravated murder if the actor intentionally or knowingly causes the death of another under any of the following circumstances . . . [including] knowingly creat[ing] a great risk of death to a person other than the victim and the actor.

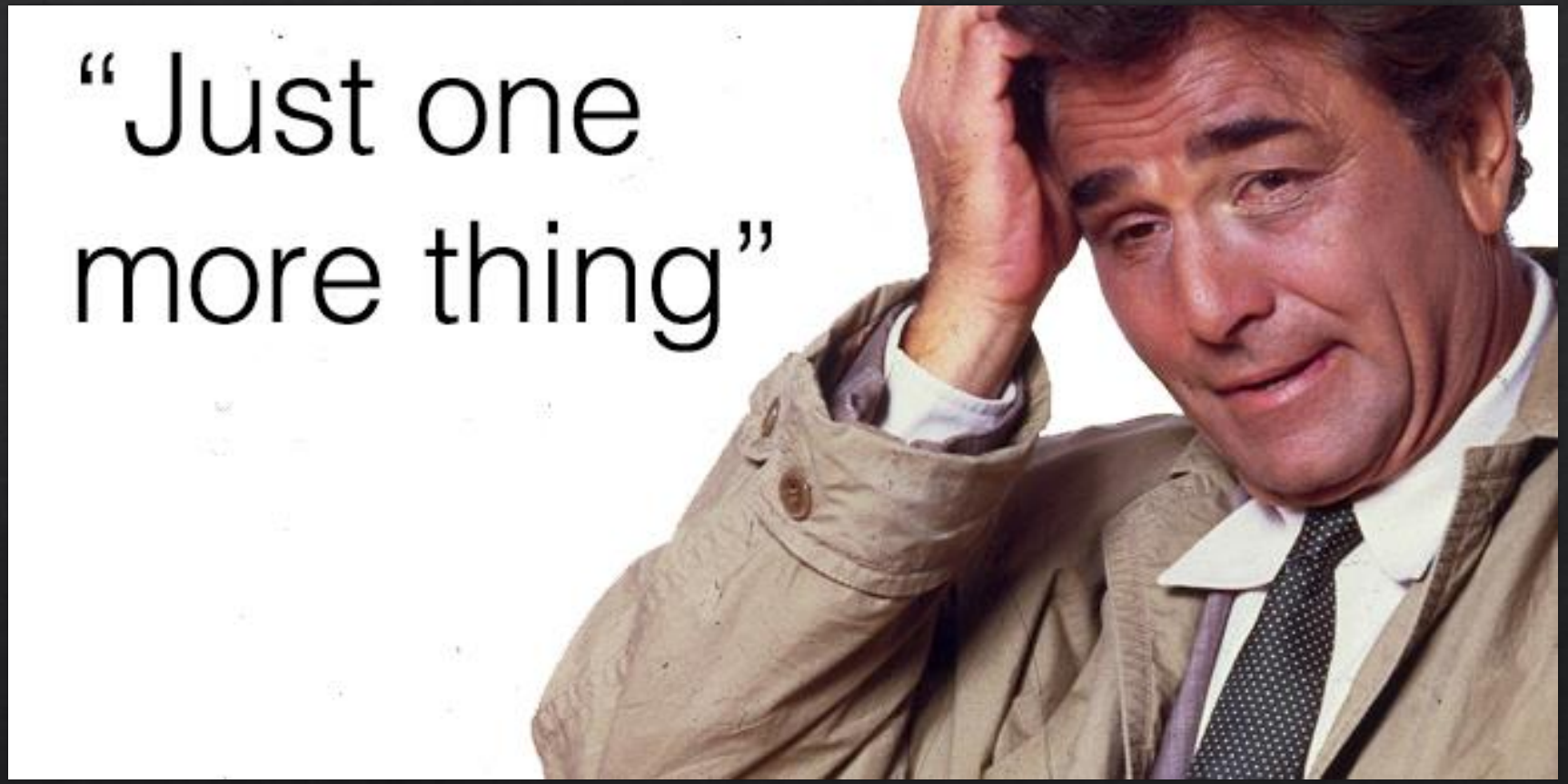
State v. Sosa-Hurtado

- The statute classifies aggravators as "circumstances." Many of our past cases show that "the relevant circumstances extend beyond the precise act that caused the death of the victim."
  - *State v. Pierre* (Utah 1977): aggravator met where risk existed "within a brief span of time" of the act causing the murder so long as the acts were part of "a concatenating series of events."
  - *State v. Johnson* (Utah 1987): aggravator met only where other person is within "zone of danger" created by the "conduct that caused the victim's death."

State v. Sosa-Hurtado

- Temporal relationship between any actions the defendant took toward third party and acts constituting the murder
- Spatial relationship between the third party, the victim and the defendant at the time of the acts constituting the murder
- Whether and to what extent the third party was actually threatened, either directly or indirectly

State v. Sosa-Hurtado



State v. Sosa-Hurtado

- Utah R. Crim. P. 24
  - (b) A motion for new trial shall be made in writing and upon notice. The motion shall be accompanied by affidavits or evidence of the essential facts in support of the motion. If additional time is required to procure affidavits or evidence the court may postpone the hearing on the motion for such time as it deems reasonable.
  - (c) A motion for new trial shall be made not later than 14 days after entry of the sentence, or within such further time as the court may fix before the expiration of the time for filing a motion for new trial.

State v. Sosa-Hurtado

State v. Sosa-Hurtado

State v. Sosa-Hurtado

State v. Sosa-Hurtado

State v. Sosa-Hurtado

- *State v. Maestas* (Utah 2012): no presumption of prejudice from an ex parte communication when it is brief, non-substantive, deals with the timing of jurors' dismissal, is disclosed to the parties, and no one objects.

State v. Martinez and State v. Bowden

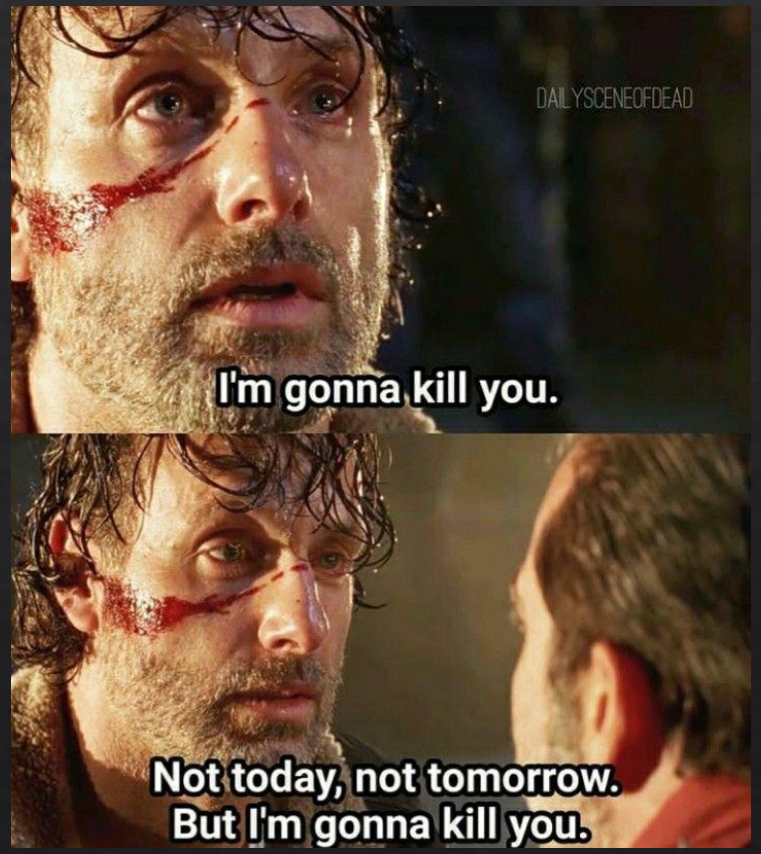
State v. Martinez and State v. Bowden

- Question 1: Does felony discharge of a firearm merge with attempted murder?
- Answer 1: No.
- Question 2: Does felony discharge of a firearm merge with attempted aggravated murder?
- Answer 2: Yes.

State v. Martinez

State v. Martinez

State v. Martinez



State v. Martinez

State v. Martinez

State v. Martinez

State v. Martinez

- Utah Code § 76-2-402(1): when the same act of a defendant under a single criminal episode establishes offenses which may be punished in different ways under different provisions, the offense is punishable under only one of them.
- (2): lesser-included offenses also merge into the greater offense.

State v. Martinez

- Enhancement statutes "single out particular characteristics of criminal conduct as warranting harsher punishment," and are exempt from merger. *State v. Bond* (Utah 2015).
- Murder statute specifically exempts several predicate offenses, including felony firearm discharge, from merger. Utah Code § 76-5-203.

State v. Bowden

State v. Bowden

State v. Bowden

State v. Bowden

- Utah Code § 76-2-402(1): when the same act of a defendant under a single criminal episode establishes offenses which may be punished in different ways under different provisions, the offense is punishable under only one of them.
- (2): lesser-included offenses also merge into the greater offense.

State v. Bowden

State v. Bowden

- Utah Code § 76-5-202: aggravating circumstances do not merge with aggravated murder. Aggravating circumstances include that the "actor was previously convicted of felony discharge of a firearm."

State v. Hatfield

State v. Hatfield

- Question: Will the depravity of pedophiles always outstrip the imagination of the legislature?
- Answer: Yes.

State v. Hatfield

- Real question: How realistic do pictures of simulated sexual activity have to be in order to be prosecutable?
- Real answer: Pretty darn, unless it has nude children in it and context clearly shows the necessary intent.

State v. Hatfield

State v. Hatfield

State v. Hatfield

- Section 76-5b-201: child pornography means "any visual depiction" that "has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct."
- Sexually explicit conduct means "actual or simulated" sex acts, as well as "the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal of any person."

State v. Hatfield

- First page: Adult male, erect penis coming out of pants; nude girl facing forward, cut-out hand made to appear as if she is reaching for the penis. Heart and bow stickers surround the scene.
- Second page: Another adult male and erect penis; fully clothed girl, cut-out hand/arm appears to be holding penis. Text bubble: “Is this right, mister?” Subtitle: TEACH HER WELL!
- Third page: two fully clothed girls flanking a large erect penis; two cut-out images of adult penile-vaginal penetration; nude girl in the corner, facing forward.

State v. Hatfield

- “Actual” means actually happened. None of this actually happened.
- “Simulated” means something that “duplicates, within the perception of an average person, the appearance of an actual act of sexually explicit conduct.” So it has to look as if the thing really happened.
- These images are not realistic enough (too “rudimentary”) to cause the average person to think that these children were actually abused, so they do not qualify as simulated sex acts.

State v. Hatfield

- To rely on the nudity subsection, the child—not adults—must be nude, because otherwise the child is not "engaging" in "the visual depiction of nudity or partial nudity for the purpose of causing sexual arousal."
- The images of nude children were clearly created with the intent to cause Hatfield's sexual arousal, and the children are engaging in nudity.

State v. Boyer

State v. Boyer

- Question 1: Does defense counsel risk frustrating the court and distracting from her better issues if she uses a kitchen-sink approach to appellate advocacy?
- Answer 1: She sure does.
- Question 2: Must a judge be disqualified from deciding a post-trial motion because he told the victim at sentencing that he believed her and told the defendant he was a coward?
- Answer 2: Not if those judgments resulted from hearing the facts in the case.
- Question 3: Must a trial court reconstruct the record with victim medical records that it ordered destroyed?
- Answer 3: Not if the defendant wasn't entitled to in camera review in the first place.

State v. Boyer

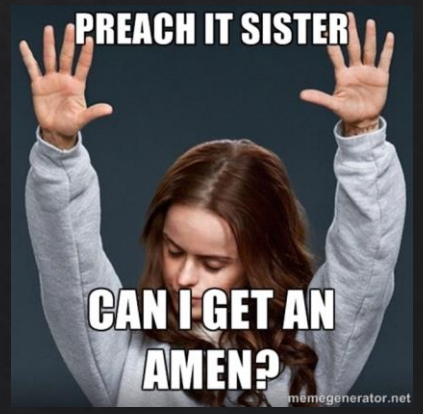
State v. Boyer

State v. Boyer

- Trial counsel should have negotiated a different stipulation on 412 evidence
- Trial counsel should have investigated the 412 evidence more
- The prosecutor argued the 412 evidence wrongly
- The prosecutor committed a *Brady* violation and hid 412 evidence
- Trial counsel should have dealt differently with the State's delayed-disclosure expert
- The delayed-disclosure expert's testimony was inadmissible for many reasons
- Trial counsel should have entered into a different stipulation on in camera review of victim's mental health records
- Trial counsel should have hired an expert to review CJC interview
- Trial counsel should have hired an expert to evaluate nurse practitioner's opinion
- Trail counsel should have cross-examined Jann on differences in disclosure stories
- Trial counsel should have impeached the victim with testimony from prior trial
- Trial counsel should have asked to strike more testimony from Jann than he did
- Trial counsel should have moved to exclude photos of Boyer's genitals rather than using them to argue that V's description was inaccurate

State v. Boyer

- **“An ineffective assistance of counsel claim is not an invitation to flyspeck the record and, with the luxury of time and the benefit of hindsight, identify ways in which counsel could have been more effective.”**



State v. Boyer

State v. Boyer

GREATEST HITS

- State v. Munguia (Utah 2011)
  - D molested his daughter from the ages of 7 or 8 to 13; Munguia refused to accept responsibility and blamed the victim; he also claimed to have just been "teaching" her about sex
  - [Dramatic reading]
- State v. Gray (Utah Ct. App. 2016)
  - D molested both of his daughters, treated them like his girlfriends for nearly a decade
  - Kouris praised the victims for their courage, told Gray: "Everything you've done is to help yourself . . . . I believe, sir, you are a monster. That's what I believe. And you know where monsters should be put? They should be put in cages and that's precisely what's going to happen here. I see no redeeming value in anything you've ever done . . . and [the victims are] never going to have to worry about their father . . . ever again."
  - As well, I'm going to write a letter to the Board of Pardons and I'm going to tell them about these amazing little kids that are sitting today in my courtroom and what you've put them through. And I would encourage them strongly that you never, ever, ever leave the Utah State Penitentiary and you are buried out there. These kids are going to have a good Christmas because they know the monster is now in a prison, they will never, ever have to worry about you again and they can move forward.

State v. Boyer

- Praised the victim, saying she had to endure a lot to tell her story, go through cross-examination from “one of the best defense lawyers in the state.” “I wish we had more people like you, quite frankly. I wish there were more heroes in this world, but you’re definitely one of them.”
- Then Boyer’s turn: “I believe every word she said, as did the jury.” “Part of the problem here is I don’t even think you have the character or the guts to even come forward and admit to what you’ve done to this poor person.”

State v. Boyer

- Need to show actual bias or appearance of bias
  - Actual bias: Due process guarantees an impartial judge, *Williams v. Pennsylvania* (U.S. 2016). Shown where judge has "a direct, personal, substantial pecuniary interest" or animus/favor toward a party
    - Really hard to show; only one SCOTUS case I could find involving German-Americans around the time of WWI
    - Extrajudicial source: animus can result from hearing the case, just not from outside information
    - Not enough just to show that judge keeps ruling against you
  - Apparent bias; even if judge isn't actually biased, the circumstances suggest it too strongly; impartiality might reasonably be questioned.
    - *State v. Alonzo* (Utah 1998)—judge joking that the defendants should just plead guilty and save everyone time.
    - If not recused for apparent bias, need to show actual bias to get new trial.
- Utah R. Crim. P. 29: Judge either agrees and recuses self, or sends it to presiding judge to decide.

State v. Boyer

- All the information here came from the case itself, and this is sentencing, where judges are called upon to make moral judgments based on aggravating and mitigating circumstances.
- A reasonable person would not see the comments as showing that he could not judge impartially.

State v. Boyer

- Utah R. Evid. 506: No privilege exists . . . in the following circumstances: . . . In any proceeding in which that condition is an element of any claim or defense.
  - So you need to show a condition, which is more than transitory feelings; something like a diagnosis, *State v. J.A.L.* (Utah 2011)
  - Then need to show that the condition is an element of the defense
  - Then need to show a reasonable certainty that the records will contain exculpatory information

State v. Boyer

- V attempted suicide after disclosing, saw therapists at two different places.
- V's aunt said that she was diagnosed with PTSD and attachment disorder.
- Defense: Jann coached V to make accusations.
  - Appellate defense counsel: trial counsel should have investigated more and argued that PTSD and attachment disorder can make people more prone to lying.

State v. Boyer

- Stipulation: the court will receive the records, review them in camera for exculpatory information.
- Court reviewed them, found nothing to disclose.
- Court then ordered them shredded. D counsel did not object.

State v. Boyer

State v. Sisneros

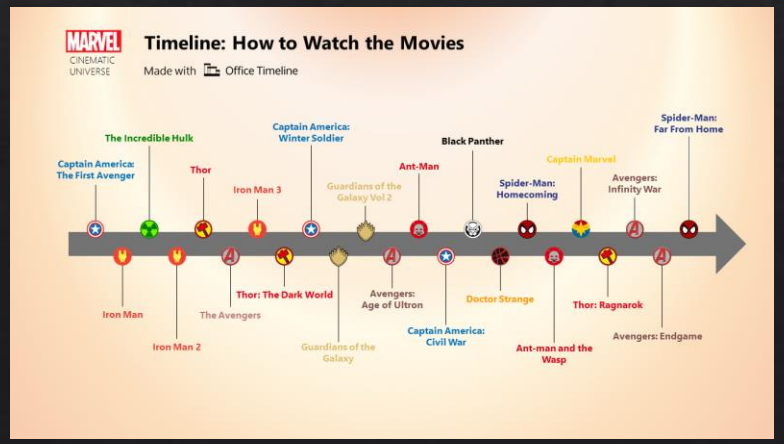
State v. Sisneros

- Question: If you rob someone of a car in Weber County, then drive to Utah County, is the possession of stolen property charge in Utah County part of the same criminal episode as the aggravated robbery charge in Davis?
- Answer: Yes.

State v. Sisneros

State v. Sisneros

- Utah County: charges possession of stolen property and obstruction of justice. Probable cause statement included facts about the robbery in Weber County.
- Weber County: five days later, charges aggravated robbery.
- Utah County: nine days later, Sisneros pleads guilty in Utah County.
- Weber County: two weeks later, he made initial appearance in Weber and moved to dismiss under single criminal episode statute.



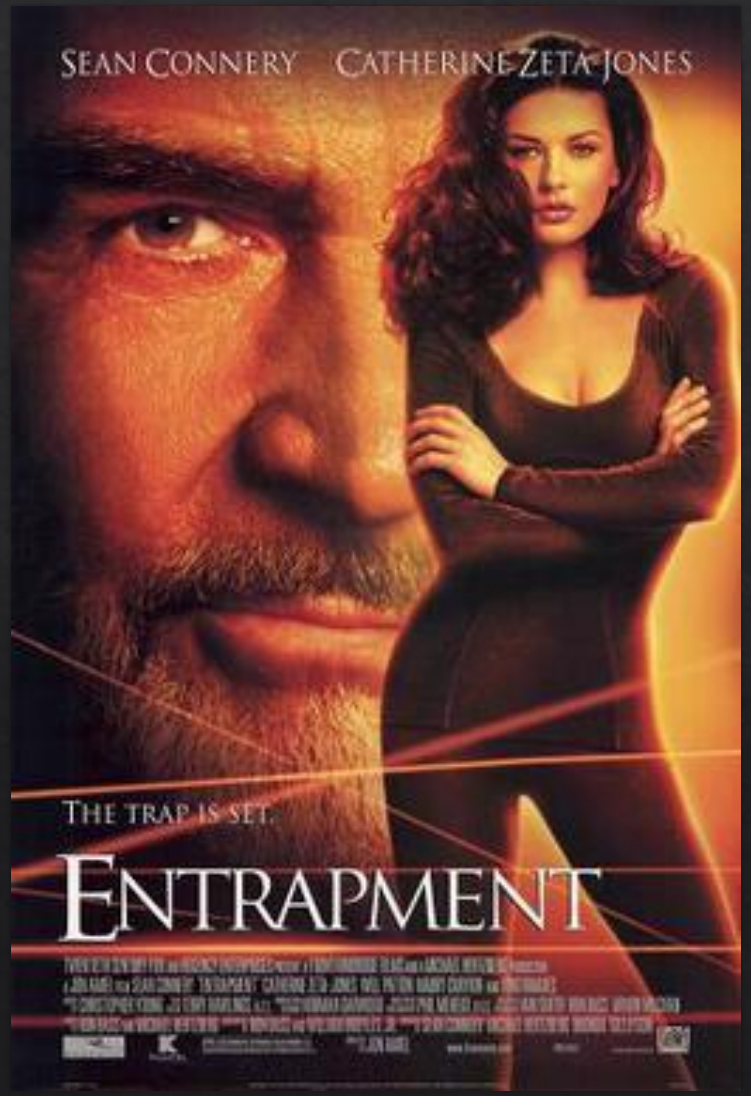
State v. Sisneros

- Utah Code § 76-1-403(1): If a defendant has been prosecuted for one or more offenses arising out of a single criminal episode, a subsequent prosecution for the same or a different offense arising out of the same criminal episode is barred if:
  - (a) the subsequent prosecution is for an offense that was or should have been tried under Subsection . . . (2) in the former prosecution; and
  - (b) the former prosecution (ii) resulted in conviction.
- (2) Whenever conduct may establish separate offenses under a single criminal episode, . . . a defendant shall not be subject to separate trials for multiple offenses if:
  - (a) The offenses are within the jurisdiction of a single court; and
  - (b) The offenses are known to the prosecuting attorney at the time the defendant is arraigned on the first information or indictment.
- Single criminal episode means "all conduct which is closely related in time and is incident to an attempt or an accomplishment of a single criminal objective."

State v. Sisneros

- Conviction: Yep, pled guilty in Utah County.
- Close in time: Yes, just the time it takes to drive from South Ogden to Provo.
  - We argued this was like *State v. Ireland* (Utah 1977); Ireland kidnapped a police officer, put him in the trunk of patrol car; Ireland then drove his own car 65 miles away, where he robbed two hitchhikers. Court of Appeals disagreed, saying there weren't separate victims and unrelated offenses here. This was all of a piece.
- Single criminal objective: Yep. *State v. Rushton* (Utah 2017)
  - Location: the crime of theft by receiving started the instant the robbery was over in Weber.
  - Nature of the offenses: it was all about the car.
  - Victims: Son and Dad, but Son was also a victim of the agg robbery, since it was his car.
  - Next-in-time offense: there wasn't stopping and reflection between offenses here.
- Jurisdiction of single court: Second district had jurisdiction over both.
- Prosecutor's knowledge: Utah County attorney had notice of robbery through PC statement.

State v. Hatchett & Hernandez



State v. Hatchett

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State v. Hatchett

- Utah Code § 76-2-303(1): Entrapment occurs when a police officer [or their agent] induces the commission of an offense . . . by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.
- Objective standard, focus on police conduct, *State v. Torres* (Utah 2000).
- Examples: extreme pleas of desperate illness, close personal friendship, inordinate sums of money, appeals to extreme vulnerability, *State v. Martinez* (Utah App. 1993).

State v. Hatchett

- Pedophiles know the law and will often make lawful advertisements seeking to lure minors in using certain terms.
- And there was no pestering or emotional pleas here, and it was Hatchett who raised the possibility of illegal activity, required no prompting.
- Mere but-for causation is not enough; it's about the methods.

State v. Hernandez

State v. Hernandez

State v. Hernandez

State v. Hernandez

State v. Hernandez

State v. Gavette